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Supreme Court of the United States

ELAINE WEBB-EDWARDS, PETITIONER

v.

KEVIN BEARY, IN HIS OFFICIAL CAPACITY AS ORANGE COUNTY SHERIFF

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question Number One

Whether the Eleventh Circuit opinion conflicted with decisions from other circuits and this Court's decisions in *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct 2720 (1977) and *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S.Ct 1196 (1991) by considering the threat of physical harm for a position sought in determining whether adverse employment action occurred.

Question Number Two

Whether the Eleventh Circuit Court decision, affirming the grant of a directed verdict against the Petitioner, pursuant to the Federal Rule of Civil Procedure, 50(a), after a jury awarded Petitioner $500,000.00, violated the principles established in this Court decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000) by substituting its judgment for that of the trier-of-fact after a jury found in favor of Petitioner on the issues of adverse employment action and gender discrimination when there was evidence of material differences and responsibilities between the position held by the Petitioner and the position sought, the policy of Respondent did not exclude females for the position, females worked in the position at issue both prior to and after the tenure of the decision-maker, the Human Resource Director for Respondent admitted that the Petitioner should have been given the opportunity to work the position, and the supervisor for the position stated that the Petitioner should have had the position, was qualified for the position and could handle the position.

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PETITION FOR A WRIT OF A CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The district court entered an order granting Respondent's Motion for A Directed Verdict on May 4, 2007, 45a – 65a. [1] The court of appeals' opinion (per Edmondson, C.J., joined by Hill and Alarcon, JJ.) was issued on April 22, 2008, 1a – 41a. The court of appeals denied a petition for rehearing en banc on July 25, 2008, 66a. The opinion of the Eleventh Circuit Court has been published, 525 F.3d. 1013.

JURISDICTION

The court of appeals entered its opinion and order on April 22, 2008, and denied the petition for rehearing en banc on July 25, 2008. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Section 703(a)(1) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part: It

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[1] All references to the Appendix submitted herein will identify the page number followed by a. Any references to the record of the District Court, will be the docket number for the trial transcript or document that was filed, followed by the page number where the statements are identified, e.g. R84-110.

shall be an unlawful practice for an employer... to discriminate against any individual with respect to his ... terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT

Petitioner brought suit under Title VII of the Civil Rights Act of 1964 for sexual harassment, retaliation and gender discrimination, the District Court having jurisdiction under 42 U.S.C. § 2000e-5(f)(3). After summary judgment the only issue remaining was gender discrimination which a jury ruled in favor of Petitioner that she had been subjected to an adverse employment action based on gender when she was bypassed for a School Resource Officer position at Gateway Middle School; that Petitioner's gender was a substantial or motivating factor that prompted the Respondent to take that action; and denied Respondent's defense that it would have bypassed the Petitioner for the position for other reasons in the absence of gender as a motivating factor.

Petitioner was employed as a Deputy Sheriff with Respondent in July 1995. On July 27, 2004 the Respondent posted an announcement of a vacancy for a position as a School Resource Officer (SRO). She applied for the position on August 4, 2004 and was interviewed by a three person panel on September 9, 2004 which ranked the Petitioner second of four applicants. The first person ranked received the available position at Piedmont Lakes Middle School. A second position opened at Gateway Middle School where Petitioner was passed over for a male. The

decision-maker for the Respondent testified at the jury trial held in this cause he deviated from the ranking of the board and admitted that he did not want a female at the school, 47a. Petitioner's ranking had previously been approved without deviation by the elected head of Respondent.

The testimony of the supervisor of the SRO positions for the subject middle schools during the relevant timeframe stated that the Petitioner should have had the position at Gateway, was qualified for the position, and could handle the position, R84-110. A memorandum submitted at trial by Respondent indicated there were concerns as to the frequency and number of disciplinary incidents at Gateway and requested that two officers be placed there but there was no restrictions on females working as SROs at Gateway, R84-151, 160. It is undisputed that females are required to undergo the same training of shooting proficiency, field tactical training, and other requirements when employed by Respondent, R84-150, 151.

The Human Resource Director of Respondent admitted at trial that the Petitioner should have been given the opportunity to work as an SRO at Gateway, R84-90. Prior to the decision-maker being the head of SROs a female was working as an SRO at Gateway, R85-15, 16. After this decision-maker left the hierarchy a female was placed in the SRO position at Gateway and was working the position at the time of the trial in this cause, R84-115, 116.

It is undisputed that the placement of SRO positions were competitive in nature. There was a

posting, interviews were conducted by a three person panel, the panel ranked the applicants, and the panel's ranking was approved without deviation by the elected official for Respondent. It was also undisputed that shift changes from day to night, or vice versa, or geographical sector changes do not require approval of the elected official nor is there any competitive process of posting, interviews or rankings.

At the time the Petitioner sought the SRO position she was a Property Detective. The supervisor for SROs at Orange County middle schools testified at trial that the duties among SROs are different among the middle schools and there had been a previous recommendation that two deputies be assigned to Gateway Middle School due to the nature of the students and difficulties encountered therein. The Opinion of the Eleventh Circuit Court noted the significant differences between a property detective and one who held an SRO position at Gateway, 39a, since a property detective has an occasional encounter with a perpetrator who resists an arrest while an SRO at Gateway Middle School has a daily threat of physical assault.

A jury rendered a verdict for $500,000.00 in favor of Petitioner after finding that Petitioner was subjected to an adverse employment action based on her gender; that gender was a substantial and motivating factor that prompted the Respondent to take such action and rejected Respondent's affirmative defense that the Petitioner would have been bypassed for the Gateway Middle School SRO position for other reasons in the absence of gender as a motivating factor, 42a – 44a.

Respondent did not challenge the sufficiency of evidence on the issues of discrimination at the time of filing a post-trial motion as well as during the appeal with the Eleventh Circuit Court. In fact, it was conceded by counsel for Respondent that the evidence of gender discrimination was sufficient which was noted by the Eleventh Circuit Court in its Opinion, see footnote 4, 41a.

Subsequent to the trial the district court granted a Rule 50 Motion in favor of the Respondent finding there was no adverse employment action and vacated the jury verdict, see Opinion of the District Court dated May 4, 2007, 45a – 65a.

The Eleventh Circuit Court of Appeals denied the Petitioner's appeal of the decision of the district court on April 22, 2008, 1a – 42a, the published Opinion is found at 525 F.3d. 1013 (U.S. 11th Cir. 2008). The appeal also addressed other issues that are not subject to this Petition involving the propriety of the granting of a summary judgment as to Petitioner's claims of sexual harassment and retaliation, as well as an argument of whether waiver was involved in the submission by Respondent of a Rule 50(a) Motion post-trial.

As to the issues involved in this Petition the appeals court noted the decision-maker's opinion that Petitioner would not have been safe as the lone SRO at Gateway Middle School, and cited his testimony of his intentions of deviating from the placement ranking was to "protect" the Petitioner. The court concluded that the Petitioner failed to demonstrate the deviation of the decision-maker from the transfer review board's rank

was an adverse employment action. The Court noted that the Petitioner's wages, benefits and rank were not affected. The Court further stated, "More importantly, a transfer to Gateway Middle School would have placed her in constant danger of physical assault." The Court also provided further reasoning for its decision that there was no evidence in the record "that a reasonable person faced with a choice of remaining as a property detective with an occasional encounter with a perpetrator resisting arrest would prefer being transferred to a position where she faced the daily threat of being physically assaulted."

On July 25, 2008 the Eleventh Circuit denied the Petitioner's Petition for Rehearing En Banc, 66a.

This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

Without precedent or authority the Eleventh Circuit has articulated a new standard in the definition of adverse employment action. The Court has pronounced a reasonableness of the "threat of physical harm" factor in the analysis of what constitutes an adverse employment action. By this new definition the Petitioner's exclusion into an SRO position at a middle school was determined to not constitute adverse employment action. This definition of adverse employment action by the Eleventh Circuit is without authority and conflicts with other circuits as well the decisions of the United States Supreme Court in *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720 (1977) and *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S.Ct. 1196 (1991). Additionally,

there exists a conflict among the circuits as to the definition of "adverse employment action."

The Eleventh Circuit Court further departed from the principles in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000) the Court substituting its own judgment for the trier-of-fact. The jury found in favor of Petitioner on the issue of adverse employment action and there was evidence presented of material differences and responsibilities between the position held by the Petitioner and the position sought. The jury further found gender discrimination as a result of the failure of the Respondent to place the Petitioner into the SRO position at Gateway Middle School and rejected the affirmative defense of Respondent that it would have made the same decision in the absence of discriminatory motives. The trial court decision vacating the jury verdict was based on a finding that the Petitioner did not establish a prima facie case as no adverse employment action had occurred. The district court did not find there was a lack of evidence supporting gender discrimination. Additionally, counsel for Respondent conceded that the evidence of gender discrimination was sufficient.

A comparative analysis between Petitioner and the individual chosen for the SRO position as to physical size and other consideration was rejected by the jury. Under Reeves the court is required to construe the reasonable inferences from the record evidence in favor of Petitioner since she was the non-moving party in Respondent's Motion for a Directed Verdict. This case is unique since the Rule 50(a) Motion was granted after the jury made its findings in reaching

a verdict. For the appeals court to reject the findings of the trier-of-fact, the jury in this instance, and render an opinion that is contrary to well established precedent is clearly impermissible under Reeves. The jury had substantial evidence to support its decision including the fact Plaintiff was ranked second by the interview panel and should have been placed at Gateway Middle School because that school had the second opening in the fall of 2004, the decision-maker deviated from the rankings expressly stating that he did not want a female officer at that school; that females worked at Gateway Middle School both prior to and after the tenure of the discriminatory decision-maker; Respondent's Human Resource Director admitted that the Petitioner should have been given the opportunity to work as an SRO at Gateway; there was no policy to exclude females working at Gateway; and the supervisor of all middle schools testified that the Petitioner should have had the position at Gateway, was qualified for the position, and counsel handle the position.

I. Certiorari Is Warranted Because The Decision Below Conflicts With Decisions Of This Court and Of Other Circuits

The Eleventh Circuit Court decision which upheld the district court's decision to vacate a jury verdict of $500,000.00 on a finding that no adverse employment action existed is in conflict with other circuits as well as this Court as to the definition of "adverse employment action."

At the onset it should be recognized that while this Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53, 126 S.Ct. 2405 (2006) expanded the scope of the definition of adverse employment action in the context of retaliation cases the finding of adverse employment actions on substantive discrimination claims are not changed by the Burlington Northern decision, see page 2414 of Burlington Northern. There exists a conflict among the circuits as to the definition of "adverse employment action."

The Eleventh Circuit in its decision below established an unprecedented definition of adverse employment action which conflicts with the authority of the United States Supreme Court.

On the issue of adverse employment action the Eleventh Circuit stated, 39a of the Opinion,

> "The record in this case does not demonstrate that passing over Ms. Webb-Edwards resulted in a serious and material change in the terms, conditions, and privileges of employment. Her wages, benefits, or rank were not affected. More importantly, a transfer to Gateway Middle School would have placed her in constant danger of physical assault. She did not present any evidence that she faced less of a threat of harm in her position as a property detective."

The Eleventh Circuit Court has factored the "threat of harm" in determining whether an adverse employment action has occurred. It is respectfully submitted that a "threat of harm" criteria to determine

whether an adverse employment action occurred could be used to validate discrimination in many job classifications. Such a precedent could set back enforcement of gender discrimination laws by decades as the panel decision of the Eleventh Circuit is clearly allowing the risk of safety and its corollary, risk of failure to succeed, determine whether an adverse employment action has even occurred. This places subjective considerations at the forefront of the analysis instead of the objective factors required in comparisons on the differences in responsibilities, prestige and pay. Various positions among multiple industries could be prohibitive for females under this new standard. For example, convenience stores could prohibit females from working night shifts due to the high risk of armed robberies that occur during that shift.

The difficulty of determining "threat of harm" in any decision-making and whether adverse employment action occurs is apparent from the decision of the Eleventh Circuit. The opinion is contradictory because in one sentence, 39a, the Court states, "She did not present any evidence that she faced less of a threat of harm in her position as a property detective." However, in the preceding paragraph, 39a, the Court stated the following,

> "There is no evidence in the record that a reasonable person faced with a choice of remaining as a property detective with an occasional encounter with a perpetrator resisting arrest would prefer being transferred to a position where she faced the daily threat of being physically assaulted at a school populated

> by students as old as twenty-two, majority of whom had been placed at that school because of their criminal activity and their disturbed medical condition."

While the opinion states that there is no evidence that the Petitioner faced less of a threat of harm when comparing the position the Petitioner had at the time she applied to be an SRO to the position sought, the Court opines it would be unreasonable to seek a move from one position to another due to the threat of harm of the new position. Whether a position sought constitutes a reasonable risk of harm is a new standard to define an adverse employment action.

The SRO position at Gateway Middle School was the second position open in the fall of 2004. The interview panel for Respondent had ranked Petitioner second among the full applicants. The decision-maker on the placement of SROs at Gateway deviated from the ranking of the interview panel because he did not want a female officer at such a high risk school, see District Court Order of May 4, 2007, 47a. The Eleventh Circuit Court noted that the decision-maker testified, "his sole intention in deviating from the transfer ranking was to "protect "Elaine [Webb-Edwards]", see Opinion, 38a.

To exclude females from a job position because of safety concerns has been addressed before the U.S. Supreme Court in *Dothard v. Rawlinson*, 433 U.S. 321 (1977) and *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S.Ct 1196 (1991). Dothard required a high correlation between sex and the ability to perform job functions and refused to allow employers

to use sex as a proxy for strength although it may be a fairly accurate one. Dothard did allow an employer to hire only male guards in contact areas of maximum security male penitentiaries. No party in the case at bar or the trial court has suggested that an SRO at a middle school, which has both male and female students, is remotely similar to the maximum security male penitentiaries. In Johnson Controls this court prohibited an employer from arguing safety concerns to exclude females from getting certain job positions unless the employer proves that one's gender interferes with the employee's ability to perform. Neither a bona fide occupational qualification or business necessity defense was ever argued by Respondent before the Eleventh Circuit Court of Appeals.

While the "threat of harm" could be viewed as facially neutral since this standard infers physical stature as a criteria there is little doubt it will be used, as it was in the case at bar, to expressly discriminate against females. In the case at bar the decision-maker expressly excluded the Petitioner from consideration without investigating her background and experience. An interview panel would certainly be aware of a potential placement of Petitioner into the middle school in question when the Petitioner was ranked second out of four applicants for SRO positions in the fall of 2004. When the second position opened, which was at Gateway Middle School, the decision-maker deviated from the ranking providing direct evidence of gender discrimination since he testified he did not want a female at the school. At trial, the decision-maker advanced his paternalistic and gender bias attitude by stating his sole intention in the deviation from the ranking was to protect the Petitioner. The Eleventh

Circuit Court decision is blatantly at odds with precedent. The opinion disregarded certain truths that were established on the record including the fact Respondent has no restrictions on female deputies from entering high crime areas where their lives are in danger on a daily basis; field tactical and shooting proficiencies of male and females applying for job positions of respondent are identical; there was no policy that prohibited females from being employed at Gateway Middle School, and females were employed for the very position at Gateway Middle School both before the discriminatory decision-maker was in the hierarchy of SROs and a female was working as an SRO at Gateway Middle School after the discriminatory decision-maker left the hierarchy.

Considerations of risk of safety and potential success for a position sought is without precedent and a more subjective test that has ever been previously articulated by any circuit court in defining what an adverse employment action is.

Cases prior to Burlington Northern are still dispositive on the finding of adverse employment action on "substantive" discrimination claim's, that is, non-retaliatory discrimination claim's.

There is a conflict among the circuits as to what constitutes adverse employment action. The Tenth Circuit in *Hillig v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004) recognized this conflict and stated the Court was in harmony with the Ninth Circuit in *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997) and the District of Columbia circuit in *Smith v. Secretary of the Navy*, 659 F.2d 1113 (DC Cir. 1981), see Hillig at 1034. The Tenth

Circuit rejected a definition of adverse employment action for only those employment actions that result in "tangible harm" to the plaintiff. The court held that the plaintiff "need only show a likely effect on future job opportunities." The Tenth Circuit noted the Ninth Circuit's holding in Hashimoto that a negative job reference in itself is an adverse employment action and cited the notation of the Ninth Circuit "that this unlawful personnel action turned out to be inconsequential goes to the issue of damages, not liability." The District of Columbia circuit case of Smith found adverse employment action for negative job performance evaluations given for discriminatory reasons noting that "an illegal act of discrimination is wrong in itself under Title VII, regardless of whether that wrong would warrant an award of back pay or potential hiring."

The Tenth Circuit in Hillig specifically rejected the Seventh Circuit definition of adverse employment action found in *Rabinovitz v. Pena*, 89 F.3d 482 (7th Cir. 1996) which requires a "materially adverse change to the terms or conditions of employment." The definition of adverse employment action in the Seventh Circuit, at page 488, specifically states the following:

> "A materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration in job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities,

or other indices that might be unique to a particular situation."

The Eight Circuit in *Ledergerber v. Stangler*, 122 F.3d 1142 (8th Cir. 1997) also requires a "material change in the terms or conditions of employment." The facts of that case indicated that the plaintiff, a supervisor, experienced a change of her staff only yet salary, benefits, responsibilities, title and even office location remained the same. No adverse employment action was found as the court applied the facts to the established authority of the Eighth Circuit as to what constitutes a "purely lateral transfer" which does not rise to a level of materially adverse employment action as required to establish a cause of action. The court cited *Williams v. Bristol-Meyers Squibb Co.*, 85 F.3d 270 (7th Cir. 1996) which held that a transfer involving only minor changes in working conditions and no reduction in pay or benefits will not constitute an adverse employment action, "otherwise every trivial personnel action that an irritable employee did not like would form the basis of a discrimination suit."

The Fifth Circuit has recently articulated a multiple factor analysis to determine whether an adverse employment action has occurred. In *Alvarado v. Texas Rangers*, 492 F.3d 605 (5th Cir. 2007) the trial court's entry of summary judgment based on a finding that adverse employment action had not occurred was reversed. The Court articulated at page 614 multiple factors to determine whether adverse employment action had occurred. These factors include whether the position: entails an increase in compensation or other tangible benefits; provides greater responsibility or better job duties; provides greater opportunities for

career advancement; requires greater skill, education or experience; is obtained through a complex competitive selection process; or is otherwise objectively more prestigious.

The Alvarado Court ultimately disposed of the issue in favor of the employee primarily due to the process of posting, interviews, ranking and approval by upper management. In the case at bar the petitioner participated in the competitive process of the respondent who had posted the position for SROs available for the upcoming school term, conducted interviews of those who applied, ranked applicants and their ranking was approved by upper management, including the agency head. The establishment of a competitive process for the position that Petitioner sought established the fact that there were materially different responsibilities between the position sought and the positions held by the applicants. This competitive process established that the placement of the SROs was not merely a lateral transfer. A true lateral transfer, such as where a deputy sheriff transfers from one geographic sector to another but continues the same working assignments, or a shift change, such as from dayshift to nightshift, would not require any postings, interviews, or ranking by an interview panel or approval of upper management.

The District Court vacated the jury verdict on May 4, 2007. The District Court found no adverse employment action having determined, "the transfer to the SRO position was a lateral transfer", see 53a. The District Court cited *Davis v. Town of Lake Park, Fla.* 245 F.3d 1232 (11th Cir. 2001). The Court in Davis found no adverse employment action because the only

adverse employment action involved a temporary assignment and a negative memorandum. In the case at bar, the SRO position at Gateway Middle School was a permanent placement and the challenging environment could have provided Webb-Edwards with more promotional opportunities in the future. The Tenth Circuit in Hillig, citing accord with the Ninth Circuit and the District of Columbia circuit, held a plaintiff need only show "a likely effect on future job opportunities." It is important to note in the case at bar the District Court noted the SRO position would entail special training, a willingness to work extra curricular activities, the ability to work with a principal, teachers and staff, and meet with groups of children; along with having to participate in a competitive application process, see 53a. The District Court concluded that the seeking of the position as an SRO at Gateway Middle School was a competitive position and by inference a desirable one, see the District Court's Order on Respondent's Motion for Summary Judgment of February 27, 2007, R47-17.

In the case sub judice the Eleventh Circuit Court opinion never found the petitioner seeking of the SRO position as a lateral transfer. Instead, the Eleventh Circuit focused on the "threat of harm." The Court expressly stating, "Her wages, benefits, or rank were not affected. More importantly, a transfer to Gateway Middle School would have placed her in a constant danger of physical assault." Articulating a "reasonable person" standard although in reality a more subjective one, the appeals court considered the differences between a property detective in relation to a "threat of harm" as an SRO at Gateway. The appeals court claimed "no evidence in the record" supports a

reasonable person choosing work at an SRO position than remaining as a property detective. Finding whether an adverse employment action exists on these terms of what constitutes "threat of harm" between two positions has no precedent among any prior circuit court decisions, and violates the principles that establish by this court in *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct 2720 (1977) and *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S.Ct 1196 (1991).

II. Certiorari Is Warranted Because The Decision Below Is Contrary To The Requirements Of This Court Under *Reeves v. Sanderson Plumbing Products, Inc.*

The Eleventh Circuit Court opinion upheld the District Court vacating a jury verdict based on a Motion for Directed Verdict under Rule 50. The decision is contrary to the requirements of Rule 50 under *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000). In order for the Respondent to have prevailed under a Rule 50 Motion all reasonable inferences are construed in favor of Petitioner and there would have to be no legally sufficient basis to find that an adverse employment action had occurred.

The appeals court was in a unique position to rule on the District Court granting the Respondent's Rule 50 Motion since the trial concluded in a jury verdict favorable to the Petitioner.

The Eleventh Circuit Court misapplied the standard of review dictated by Rule 50. The Court disregarded evidence favorable to the Petitioner and failed to construe reasonable inferences in Petitioner's favor.

The Petitioner presented both direct and circumstantial evidence to prove that an adverse employment action had occurred, gender was a substantial or motivating factor in the employment decision, and refuted Respondent's defense that it would have made the same decision in the absence of discrimination, see Jury Verdict, 42a.

As noted by the Eleventh Circuit Court's Opinion, footnote 4, 41a, "the district court concluded that Ms. Webb-Edwards demonstrated direct evidence of gender discrimination. During oral argument, counsel for the county conceded that the evidence of gender discrimination was sufficient." The decision-maker had testified he did not want a female officer at Gateway Middle School.

The jury's determination of Question No. 3 that Petitioner would not have been bypassed for a Gateway SRO position for other reasons even in the absence of gender as a motivating factor was a rejection of the physical statute defense of Respondent. Evidence showed that females are required to undergo the same training in shooting proficiency, field tactical training, and other requirements when employed by Respondent; there are no restrictions by Respondent of female deputy sheriff's from entering high crime areas where their lives are in danger on a daily basis; Respondent's supervisor of SROs at middle schools

testified that she believed that the Petitioner was qualified for the position and it was unfair not to have placed the Petitioner into the position; the Human Resource Director admitted that the Petitioner should have been given the opportunity to work the SRO position at Gateway Middle School; females were allowed to work at Gateway Middle School in SRO positions prior to the discriminatory decision-maker becoming head of SROs for Respondent; and subsequent to the decision-maker leaving his position females were placed in SRO positions at Gateway Middle School. In short, both the policy and practice of Respondent did not exclude the Petitioner from being employed as an SRO at Gateway Middle School. The Eleventh Circuit Court disregarded the evidence on the record as there is no reference to this factual support in favor of the Petitioner.

The non-placement of Petitioner, a deviation from Respondent's placement processes being engaged in a competitive process which included an interview panel was solely the product of paternalistic, gender biased attitude of the decision-maker who acknowledged during trial his sole intention in deviating from the transfer ranking was to protect the Petitioner, see Eleventh Circuit Court Opinion, 38a. It is clear that the Eleventh Circuit Court disregarded the evidence and the findings of the jury and substituted its own judgment as to the "physical stature defense."

It is also clear that the Eleventh Circuit's rejection of the jury's decision resulted in their determination that no adverse employment action occurred, an element the Petitioner's is required to

prove to establish a prima facie case. Without precedent the Eleventh Circuit articulated a new standard as to the "threat of harm" the Petitioner faced where the question presented on appeal is whether adverse employment action occurred since that was the grounds that the District Court vacated the jury verdict which awarded $500,000.00 to the Petitioner.

The Eleventh Circuit Court has impermissibly rendered a subjective view of the propriety of the placement of females in dangerous positions to resolve the ultimate question on the propriety of vacating a jury verdict, whether an adverse employment action occurred. This subjective view is embodied in the Opinion at 39a where the Eleventh Circuit set forth a "reasonable person" standard and answers the question on a subjective basis contrary to the findings of the jury. The Eleventh Circuit panel chose what was best for the Petitioner and stated,

> "There is no evidence in the record that a reasonable person faced with a choice of remaining as a property detective with an occasional encounter with a perpetrator resisting arrest would prefer being transferred to a position where she faced a daily threat of being physically assaulted at a school populated by students as old as twenty-two, the majority of them having been placed at that school because of their criminal activity and their disturbed mental condition."

The very next paragraph, the last sentence states, "She did not present any evidence that

she faced less threat of harm in a position as a property detective."

There is a clear contradiction when the panel below talks of "no evidence" to support the choice of a "reasonable person" and identifies that choice of one between a "daily threat of being physically assaulted" as an SRO compared to "an occasional encounter with a perpetrator resisting arrest", a position held by Petitioner as a property detective. Yet, the panel then states in the very next paragraph that there is no evidence that Petitioner, "faced less of a threat of harm in her position as a property detective."

A reasonable construction of the evidence shows that there was materially different responsibilities between a property detective and an SRO position. In fact, the Respondent went to great efforts to show that there are materially different responsibilities even within the SRO positions between Gateway Middle School and others. The supervisor for SRO positions for middle schools testified that Gateway was enforcement position while other SROs were teaching. Further, the SRO position at Gateway was such a tough assignment there had been a recommendation that two SROs be place. Additionally, the placement of SROs in fall of 2004 was a competitive one with a posting, interview panel, rankings and elected agency head approval not like shift changes or sector changes. The SRO position at Gateway was a permanent placement in a challenging environment which would have provided the Petitioner with more promotional opportunities in the future as Petitioner would be in the position to impress her superiors if she performed her responsibilities despite these challenges.

Under Reeves the district court as well as the appeals court is required to construe the reasonable evidence from record evidence in favor of the non-moving party. The jury found adverse employment action had occurred, see Question No. 1 of the Verdict Form, 42a. There is record evidence to support that adverse employment action occurred due to the materially different responsibilities between the property detective and the SRO position sought which the Eleventh Circuit recognized factually yet impermissibly substituted their own judgment in violation of Reeves.

The substituted judgment is evident since the panel articulated a "reasonable person" standard that brings into play concerns of safety risk that are not valid according to the U.S. Supreme Court precedent in Dothard and Johnson Controls. Further, concerns of safety risk were never advanced by Respondent on the question presented as to adverse employment action during the appellate process.

Not only did the court below not construe all reasonable inferences in favor of Petitioner but did the opposite, construing evidence against her. On page 38a of the Opinion the Eleventh Circuit cites *Impact v. Firestone*, 893 F.2d 1189 (11th Cir. 1990) which allows for discrimination based on comparison of personal and "technical training" characteristics. The argument of Respondent as to the physical stature and SWAT training of the individual who was chosen instead of Petitioner despite her higher ranking was a defense that was rejected by the jury, see Question No. 3 of the Verdict Form, 43a. The Respondent's supervisor of school resource officers of middle schools

acknowledged, which was confirmed by an exhibit establishing the qualifications for an SRO, that the qualifications posted by the Respondent had no prerequisite that one needs to have SWAT team or military experience for the position, R84-105. It is critical to note that the District Court did not find that the evidence was insufficient for the jury's finding in this regard; Respondent never disputed during the appeal that the evidence was insufficient for the jury's finding; and counsel for Respondent even conceded at oral argument that the evidence was sufficient, see Opinion, footnote 4, 41a.

In conclusion, it is clear the court of appeals disregarded evidence favorable to the Petitioner which proved that adverse employment action occurred, and proved the jury properly rejected the physical statute defense of Respondent. The Court below was required to construe all reasonable inferences in favor of Petitioner which it failed to do. Ultimately, the appeals court impermissibly substituted its judgment by ruling favorably for Respondent on the physical stature defense that was rejected by a jury where the evidence was so overwhelming in favor of Petitioner even Respondent's counsel conceded before the appeals court that the evidence of gender discrimination was sufficient. To articulate a new standard for adverse employment action, factoring risk of harm is not only contrary to law but was not even supported by the evidence at trial.

CONCLUSION

For the above and foregoing reasons the Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,
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No. 07-12599
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELAINE WEBB-EDWARDS,
Plaintiff-Appellant-Cross-Appellee,

Versus

ORANGE COUNTY SHERIFF'S OFFICE,
Defendant,

KEVIN BEARY, in his official capacity as Orange County Sheriff,
Defendant-Appellee-Cross-Appellant.

April 22, 2008, Decided
April 22, 2008, Filed

Appeals from the United States District Court for the Middle District of Florida.

JUDGES: Before EDMONDSON, Chief Judge, HILL and ALARCON, * Circuit Judges.

OPINION

ALARCON, Circuit Judge:

Elaine Webb-Edwards has appealed from the final judgment entered against her rejecting each of the claims set forth in her amended complaint. She contends that the District Court erred in granting

Sheriff Kevin Beary's ("the County") motion for a summary judgment dismissing her claims for sexual harassment. In granting the motion, the District Court concluded that Ms. Webb-Edwards did not demonstrate that she was subjected to suffering pervasive harassment to constitute a hostile and adverse work environment.

She also challenges the District Court's conclusion that the record showed that the County exercised reasonable care to prevent and correct any sexual harassing behavior, and that Ms. Webb-Edwards unreasonably failed to take advantage of her employers corrective measures or to avoid any harm to her. Ms. Webb-Edwards also seeks reversal of the dismissal of her retaliation claim based on the District Court's determination that she failed to demonstrate that the decision not to appoint her as the School Resource Officer ("SRO") at the Gateway Middle School was based on her gender.

In addition, Ms. Webb-Edwards seeks reversal of the order granting judgment as a matter of law, pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, of her claims for her gender discrimination and constructive discharge. After reviewing the record, we are persuaded that the District Court did not err and conclude that the judgment must stand.

I

A

The District Court granted the County's motion for summary judgment dismissing Ms. Webb-Edwards's

sexual harassment based on the evidence presented to it by the parties at that stage of the proceedings. The facts set forth in Ms. Webb-Edwards's opposition demonstrate that she was hired by the Orange County Sheriff's Office in July1995 as a deputy sheriff. In May 2000, she was assigned to the property division.

In February 2004, Sgt. Richard Mankewich was transferred to the Sector 1 property unit. He was assigned to supervise Ms. Webb-Edwards and four other detectives. Lt. Joseph Picanzo oversaw Sgt. Mankewich's performance.

Beginning the first week Sgt. Mankewich transferred to Sector 1, he started making comments to Ms. Webb-Edwards that she felt were inappropriate and sexual in nature. For example, Ms. Webb-Edwards alleged that he would say to her "that looks hot or you look hot." Sgt. Mankewich also told her that she "looked hot, but it would look better if you'd wear tighter clothes."

Similar comments were made once a week and on occasion twice a day. When Ms. Webb-Edwards asked how his wife was doing, Sgt. Mankewich replied: "She'd be better if she'd wear tighter clothes." On one occasion, Ms. Webb-Edwards submitted a request for time off. Sgt. Mankewich replied: "Well, if you start wearing tighter clothes, then you'll get it." He also stated to Ms. Webb-Edwards at a meeting where other detectives were present: "You know, Elaine, women who change their hair color usually have issues at home." In response to Sgt. Mankewich's unwelcome comments, Ms. Webb-Edwards testified in her deposition that she told him to stop, or that he was sick, or just walked away to try to avoid him.

In her deposition, Ms. Webb-Edwards testified that when she and Sgt. Mankewich were in the car together driving to take a witness's statement, her husband telephoned her, and asked her if she had lunch plans. Before she could reply, Sgt. Mankewich grabbed the telephone and told her husband: "I don't know what you're saying, but I'm eating your wife."

On April 20, 2004, Ms. Webb-Edwards told Sgt. Mankewich, in a closed-door meeting in his office, that his comments made her feel uncomfortable. He told her that if she reported him, she would not "be getting any other position." After that conversation, Sgt. Mankewich did not make any further comments about her appearance, but he continued to look at her in a way she deemed inappropriate.

On April 21, 2004, Ms. Webb-Edwards met with Lt. Mike McKinley. She told him about Sgt. Mankewich's comments about wearing tighter clothes. She did not tell him about Sgt. Mankewich's crude comment to her husband. After hearing Ms. Webb-Edwards's allegations, Lt. McKinley immediately moved her workplace to a different office about twenty minutes away from Sector 1 while her complaint against Sgt. Mankewich was investigated.

Several days later, Ms. Webb-Edwards met with Lt. Picanzo. She repeated the allegations she related to Lt. McKinley. She did not disclose Sgt. Mankewich's lunch comment to Lt. Picanzo. Lt. Picanzo stated that Sgt. Mankewich had supervision problems and needed training to correct them. The next day Lt. Picanzo met with Ms. Webb-Edwards, Sgt. Mankewich, and Captain Tom Foster. The purpose of the meeting was to address

Sgt. Mankewich's supervisory problems. Lt. Picanzo arranged a second meeting with Ms. Webb-Edwards, Detective Chris Saccano, and Sgt. Mankewich. After attending this meeting, Ms. Webb-Edwards agreed to return to her regular shift under Sgt. Mankewich's supervision. Her benefits and wages were not changed.

Around May 10, 2004, Ms. Webb-Edwdards's husband informed Sgt. Dennis Strange that Sgt. Mankewich's made comments about "tight clothes." Ms. Webb-Edwards's husband was also employed as a deputy sheriff with the Orange County Sheriff's Office. Officer Edwards told Sgt. Strange about Sgt. Mankewich's crude comment about eating his wife for lunch.

On May 11, 2004, Sgt. Strange wrote a memorandum setting forth Officer Edwards's report. He also confirmed the details of the conversation with Ms. Webb-Edwards. Sgt. Strange's memorandum was addressed to Chief Ron Stucker in the Professional Standards Division. The next day, Daniel W. Ford, the Director of Human Resources, held a meeting with Ms. Webb-Edwards and Captain Tom Foster to address her complaint against Sgt. Mankewich. Ms. Webb-Edwards informed Director Ford, and Captain Foster that she had no' informed Lt. McKinley about the lunch comment. At the meeting, Director Ford told Ms. Webb-Edwards that she had several options. She could either stay in Sector 1 under Sgt. Mankewich's supervision or transfer to Sector 3. Director Ford also advised her that he would facilitate mediation between Ms. Webb-Edwards and Sgt. Mankewich. Ms. Webb-Edwards agreed to participate in mediation if she could keep her same work schedule, transfer to Sector 3, and receive an apology letter from Sgt. Mankewich. On May

23, 2004, Ms. Webb-Edwards was transferred to Sector 3. In addition to maintaining the benefits and hours she had in Sector 1, she was further accommodated to have Wednesdays off. Sgt. Mankewich wrote a letter apologizing for his behavior.

On June 18, 2004, Ms. Webb-Edwards mailed a letter to Director Ford in which she stated that she wanted to pursue mediation with Sgt. Mankewich. She also informed Director Ford that she was in a "positive atmosphere where there [was] mutual respect." During the rest of her employment in the Orange County Sheriff's Office, she did not complain of inappropriate conduct by Sgt. Mankewich.

B

On August 8, 2005, Ms. Webb-Edwards filed a complaint against the Orange County Sheriff's Office. She alleged in Count I that she was discriminated against "on the basis of sex, and the terms, conditions and privileges of employment in violation of 42 U.S.C. § 2000e et seq." In paragraphs numbered six through ten of Count I, she alleged that she was subjected to sexual harassment by Sgt. Mankewich. In paragraph 11 of Count I, she alleged that, "Defendant discriminated against the Plaintiff as to the terms and conditions of her employment on the basis of her sex in violation of Title VII. Plaintiff incorporates by reference paragraph 19.f. in Count II as if fully set forth herein." In paragraph 19.f. of Count II, Ms. Webb-Edwards alleged that the denial of a position as a SRO was "both discriminatory and retaliatory" due to the complaints she made against her supervisor because of Sgt.

Mankewich's sexual harassment. In Count III, she alleged a common law action for negligent retention.

On August 15, 2005, the County filed a motion to dismiss the complaint on the ground that the Orange County Sheriff's Office is not a party capable of being sued under Florida law. On August 29, 2005, Ms. Webb-Edwards filed a motion to substitute the name of Kevin Beary, in his official capacity as the Sheriff of Orange County for the named defendant. The District Court granted the motion to substitute the party defendant and dismissed the Orange County Sheriff's Office's motion as moot.

On September 7, 2005, Ms. Webb-Edwards filed an amended complaint. The initial paragraph reads as follows: "Plaintiff, Elaine Webb-Edwards, files this her Amended Complaint against Defendant, Kevin Beary, in his official capacity as Orange County Sheriff for sexual harassment retaliation, and negligent retention." This statement did not allege gender discrimination. The allegations in Count I, II, and III were the same as those set forth in the original complaint.

On September 16, 2005, the County filed its answer to the amended complaint. It denied the truth of the allegations set forth in paragraphs six, seven, eight, nine, ten, eleven, and 12. The County admitted that "Plaintiff's Amended Complaint purports to state a cause of action under Title VII of the Civil Rights Act of 1964 for harassment on the basis of sex." The answer does not refer to gender discrimination. However, as noted above, he denied the allegations set forth in paragraph 11 of Count I.

On September 29, 2005, the District Court dismissed the negligent retention claim *sua sponte*.[1]

On November 3, 2005, the County filed a motion for summary judgment. It asserted that Ms. Webb-Edwards had failed to establish a genuine issue of material fact as to her claim of sexual harassment or retaliation, as alleged in Count I and Count II of the amended complaint. In the introduction to its motion, the County stated that "Plaintiff Elaine Webb-Edwards's (hereinafter "Plaintiff") Amended Complaint seeks to hold Kevin Beary, in his official capacity as Orange County Sheriff liable for hostile work environment sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964 as amended ("Title VII")."

The County also asserted that all employment actions taken by Sheriff Beary were for legitimate business reasons. It also alleged as an affirmative defense that the County maintains and enforces a policy against harassment and retaliation and provides to employees a mechanism through which to address such claims. The County argued that her failure to invoke and exhaust these available remedies bars her claims.

On December 1, 2006, Ms. Webb-Edwards filed her trial brief in this action. She asserted therein that "[t]he plaintiff has a two-count lawsuit. Count I is for gender discrimination which encompasses both sexual harassment and failure to place Plaintiff in an SRO position. Count II is for retaliation which ultimately resulted in constructive discharge."

On December 4, 2006, Ms. Webb-Edwards filed a

memorandum in opposition to the County's motion for summary judgment. She noted that the County "has only addressed the sexual harassment position and not the refusal to place the Plaintiff in a SRO position, see paragraph 11 of the Amended Complaint. The failure to place the Plaintiff in the SRO position is also a key element of Count II, the retaliation claim."

On December 8, 2006, the County filed a motion to strike the allegations of gender discrimination in Ms. Webb-Edwards's trial brief and her response to his motion for summary judgment. It asserted that "Plaintiff has alleged gender discrimination regarding not being offered the Gateway Resource Officer (Gateway "SRO") position for the first time during this litigation." The County further asserted that gender discrimination was not alleged in Ms. Webb-Edwards's EEOC charge, nor was it alleged in her amended complaint with the specificity required by Rule 8(e) and Rule 10(b) of the Federal Rules of Civil Procedure. It contended that commingling two causes of action in one count violated Rule 10(b). Ms. Webb-Edwards filed an opposition to the motion to strike in which she asserted that a gender discrimination claim was set forth in paragraph I of the amended complaint.

The District Court granted the County's motion for summary judgment as to Ms. Webb-Edwards's sexual and retaliation causes of action. The District Court denied the County's motion for summary judgment regarding the gender discrimination cause of action. It concluded that "[t]here are sufficient issues for trial in Plaintiff's complaints for gender discrimination by sexual harassment, gender discrimination by failure to place the Plaintiff in an SRO position and retaliation

resulting in constructive discharge." It also denied the County's motion to strike the allegation of gender discrimination. The Court agreed with the County that "Plaintiff's Amended Complaint is poorly organized and difficult to read." It concluded, however, that the County's argument was untimely because he "[s]hould have made this argument in response to the Amended Complaint." The District Court stated that the gender discrimination claim is alleged in the amended complaint, therefore the County was on notice of that cause of action. The District Court ordered the parties to refile their pretrial statements "focusing on the only remaining issue to be tried, gender discrimination."

C

Ms. Webb-Edwards testified during the trial that on July 27, 2004, the Orange County Sheriff's Office posted an announcement of a vacancy in the position of SRO. Ms. Webb-Edwards met the qualifications for the position. She applied for the position on or about August 4, 2004.

Prior to becoming a law enforcement officer, M. Webb-Edwards was a campus advisor at Sea Breeze High School. She served in liaison capacity for the school with the SRO. She patrolled with the SRO to break up fights and make sure students were in school. She also was the head coach of the boys' volleyball team, and the girls' softball team.

Ms. Webb-Edwards was interviewed on September 9, 2004, for a SRO position before a three-person transfer review board. After interviewing each of the applicants,

the board tallied up the scores and ranked the four applicants. Ms. Webb-Edwards was ranked second.

SRO positions were available at Piedmont Lakes and Gateway Middle School at that time. The person who was ranked first received an appointment to Piedmont Lakes. Ms. Webb-Edwards received a memorandum dated October 25, 2004, that the position at Gateway Middle School had been filled. Prior to receiving this memorandum, Ms. Webb-Edwards had been informed by several officers that she would not be appointed to serve as the SRO at Gateway Middle School, notwithstanding the fact that she was number two on the list of successful applicants.

Ms. Webb-Edwards attempted to contact Director Ford by telephone. He did not reply. On October 22, 2004, she sent an e-mail to Director Ford in which she stated she wanted to talk to him because she "was having some issues." On October 28, 2004, she went to Director Ford's office and spoke to his secretary. She told her that she had been passed over for the SRO position at Gateway Middle School. She requested that Director Ford telephone her. Director Ford did not call her.

On November 9, 2004, Ms. Webb-Edwards sent a letter of resignation to Director Ford at 2:23 p.m. to be effective on December 31, 2004. In her memorandum, she requested a meeting with a representative from Director Ford's office to discuss changing her insurance and other matters regarding her "early retirement."

Ms. Webb-Edwards testified that she decided to resign

because "she was emotionally a wreck." Her physician stated her medical condition was "stress related."

Less than two hours later, at 4:10 p.m., Ms. Webb-Edwards received an e-mail from Director Ford. It stated as follows:

> Elaine: Commander Chatman, and I tried to contact you this afternoon to advise you we are working on a resolution to the issues of your transfer to an SRO position. Before I accept your resignation and we finalize this matter, I would like to talk to you about it. Please call me on my cell phone.

Ms. Webb-Edwards testified that she did not call Director Ford as he had requested because she was emotionally upset and the e-mail did not change her decision to resign. Prior to receiving Director Ford's memorandum, Commander Julia Chatman had orally offered her the SRO position at Conway Middle School.

At 5:18 p.m., Director Ford sent another e-mail to Ms. Webb-Edwards. It reads as follows:

> Elaine, I just spoke with Commander Chatman. She advised me that she has spoken to you and offered you the position as SRO at Conway Middle School. This has been approved by Chief Hollomon and Undersheriff Stewart. I know Julia has expressed to you, as well as myself, her desire to have you come to work for her. Please take a couple of days to think about this and call Julia back and let her know whether you would like to have the position in lieu of resigning. I

> realize you told her tonight you did not want the position, but I will still like for you to think about it. So, please take a few days to make your final decision. If you would like to speak with me about it tomorrow, please call me on my cell phone at 407. . ., or call Maria and give her a number where you can be reached, and she will track me down. I am going on personal leave beginning on Thursday, so please call me tomorrow.

Ms. Webb-Edwards did not withdraw her letter of resignation. She was not told that her employment would be terminated because she had tendered her resignation. Her last day at work was December 12, 2004. She remained on the payroll until January 4, 2005 because she had accumulated vacation time.

Ms. Webb-Edwards was aware that the Orange County Sheriff's Office had a policy that permitted employees to complain about gender discrimination. She did not file a written complaint about gender discrimination.

Ms. Webb-Edwards testified that, had she not resigned, she would have continued to be employed as a property detective in Sector 3 at the same salary and benefits. She was not requested to resign from that position because of her refusal to accept a transfer to serve as a SRO at the Conway Middle School.

Commander Chatman testified that the ratings of the four applicants for the SRO position were approved by Sheriff Beary. The position at Gateway Middle School was offered to Deputy Sheriff John Leone who was ranked number 3 on the list of applicants. The failure to

transfer Ms. Webb-Edwards to the SRO position at Gateway Middle School was a deviation from the rankings.

Commander Chatman was informed by Ms. Webb-Edwards that she had been bypassed on November 9, 2004. Ms. Webb-Edwards also informed Commander Chatman on the same date that she had submitted her resignation on November 9, 2004. Commander Chatman informed Director Ford of Ms. Webb-Edwards's conversation later that day. Commander Chatman told Director Ford she thought Ms. Webb-Edwards had been treated unfairly in being passed over because she was a female.

Commander Chatman testified that Chief Jim Hollomon was the decision maker regarding the filling of SRO positions. She stated that an applicant for an SRO position does not apply for a particular school. A deputy can be assigned to any SRO position that becomes available. If an applicant denies a SRO position that is offered to him or her, he or she is taken off the list to avoid "shopping around." If an applicant is transferred to a SRO position at a particular school, he or she may be laterally transferred to another school.

Commander Chatman testified that at schools other than Gateway Middle School, a SRO's duties include teaching "gang resistance" to the students. At Gateway Middle School, however, a SRO does not have time to teach "because you're going from classroom to classroom or breaking up a fight in the hallway or assisting in the office with a student that either has--acted out is how they use the word. So, you really don't have time to actually give instructions." She further

testified that the duties of a SRO at Gateway Middle School are different from those performed at Conway Middle School.

Commander Chatman also testified that a majority of the students at Gateway Middle School have "criminal charges" and psychological or behavioral problems. A majority are also on medication. At one point, Commander Chatman recommended that two deputies be assigned to Gateway Middle School "for safety reasons."

Commander Chatman testified that when she informed Director Ford that Ms. Webb-Edwards has been bypassed, he became upset. He telephoned Chief Hollomon. He told Chief Hollomon "Jim, you know I can't do that. That's why we have a process." Within an hour or two, the Undersheriff or Chief Hollomon informed Director Ford that another position was open to offer to Ms. Webb-Edwards.

Director Ford instructed Commander Chapman to contact Ms. Webb-Edwards and offer her the SRO position at Conway Middle School. When Commander Chatman reached Ms. Webb-Edwards, Commander Chatman was told that the offer was too late and Director Ford would have to speak to her attorney. Commander Chatman tried to convince Ms. Webb-Edwards to accept the Conway Middle School SRO position because "she would be a good asset to the kids, because we needed good school resource officers. We needed some good SRO models."

Chief Jim Hollomon was called as an adverse witness. Chief Hollomon testified that he was the final decision

maker in placing SRO applicants. He testified that ordinarily he would appoint disputes to a SRO position according to the ranking by the transfer review board. Ms. Webb-Edwards was not transferred to the SRO position at Gateway Middle School although she was eligible as the second ranked applicant, notwithstanding the fact that the transfer review board's ranking was initially approved without deviation.

Chief Hollomon testified he made the decision to deviate from the ranking in filling the SRO vacancy at Gateway Middle School because "[s]he was not the most qualified person for the position off the list." He stated that "Gateway was a final step for students with severe behavioral problems, and they weren't able to function safely in a regular school environment. He asserted that his criteria for that assignment required someone who was "very physically imposing" and "had the tactical background to handle that position" at Gateway Middle School. He concluded that Deputy Sheriff Leone was qualified because he had been a SWAT team officer and was an instructor in defensive tactics. Chief Hollomon testified that "out of the four candidates I saw only one that qualified." If Deputy Sheriff Leone declined the position, he planned to repost it for other applicants.

Chief Hollomon testified on cross-examination that he was looking for someone who was physically imposing to fill the SRO position at Gateway Middle School because

> Gateway is a very unique situation. The student population there, you know, ranges from 12 to 22

> years old. These are students who cannot function in a regular school atmosphere. They have - a lot have criminal records, arrest records, and emotional problems that pose a serious officer safety threat.

Chief Hollomon testified that he was concerned for the safety of the officer assigned to Gateway Middle School. He would also not put some males at Gateway Middle School because "they're simply not up to the task. This is a special, special situation. And the more physically imposing and tactically sound the person is at Gateway, the less problems you're going to have." Chief Hollomon testified that he would not have assigned the male who placed number one on the list at Gateway Middle School because he lacked the "[p]hysical stature and tactical background and training."

Chief Hollomon requested Undersheriff Stewart Malone's permission to deviate from the list to select a person with the special skills needed to handle students with behavioral and medical problems. Sgt. Linda Newcome prepared a memorandum dated March 5, 2004, that identified the significant problems at Gateway Middle School. Chief Hollomon testified that

> Gateway was a final step for students with severe behavioral problems, and they weren't able to function safely in a regular environment, students with severe conduct or emotional disorders. Sixty percent of those students are on medication, which include antipsychotic drugs, stimulants, antidepressants and mood stabilizers. Fifty percent of the students are clinically depressed.

He also testified that some of the male students were larger than the adults on campus. Their ages ranged from fourteen to twenty-two. Many of the students had criminal histories. Sixty percent of the students were on probation for armed robbery, carjacking with a firearm, battery on a law enforcement officer, and other violent crimes. Forty-three students had been arrested on the Gateway Middle School campus for battery on a law enforcement officer, battery on a school employee, or possession of weapons and drugs. Chief Hollomon had previously recommended that more than one SRO officer should be assigned to Gateway Middle School and additional civil security guards were also needed. Chief Hollomon testified that the position was offered to Deputy Sheriff Leone, who had placed number four on the list. Deputy Sheriff Leone had been on the Orange County Sheriff's Office's SWAT team. Chief Hollomon was also aware that Deputy Sheriff Leone had been an instructor in defensive tactics. Deputy Sheriff Leone did not accept the SRO position at Gateway Middle School. Chief Hollomon knew that Ms. Webb-Edwards was a property detective. He had seen her in the gym. He would not have appointed a male to serve as a SRO at Gateway Middle School of Ms. Webb-Edwards's size and weight.

Chief Hollomon was aware that Ms. Webb-Edwards had been offered a position at Conway Middle School. He described that school as follows:

> Conway is a school that you'd want your son or daughter to attend. It is a very good atmosphere. The School Resource Officer there has an opportunity to make a difference through counseling, mentoring, teaching, coaching, doing

> all the after-school activities. It's a very positive place to be as opposed to Gateway which is controlled chaos.

Chief Hollomon approved the offer of the position at Conway Middle School to Ms. Webb-Edwards because he felt "she would be a good fit there at Conway Middle School." The pay and the benefits there were the same.

Ms. Webb-Edwards was not disciplined for refusing the SRO position at Conway Middle School. Chief Hollomon testified that he did not believe he discriminated against Ms. Webb-Edwards by bypassing her from being placed as a SRO at Gateway Middle School. He described his motivation as follows:

> I have no personal agenda here. My consideration is to put the best qualified person in a position. Gateway Middle School is a horrible place to work. I tried to put the person that I thought would probably go there, do a good job and more than anything else be safe. My intention really was to protect Elaine. I didn't think that was a good place to put her. I think other people-like I said, the physically imposing, tactically sound people are better. The way I look at things is this: Officer safety first, last, and always. And that's how I make my decisions.

Ms. Webb-Edwards testified that when she entered the police academy it was her intention to become a SRO at Sea Breeze High School where she had previously worked as a campus advisor. During that employment she was assigned to work with the SRO.

When she was notified that she would not be transferred to Gateway Middle School she was upset. She began to have chest pains. She went to a doctor in late October because she thought she had a heart condition. After she had a CAT scan of her heart, her physician determined her heart was functioning fine. He opined that her symptoms were stress-related. She also had a rash on the palm of her hand, the inside of her arms, and under and over her eyes.

Ms. Webb-Edwards testified that she decided to resign on November 9, at 2:23 p.m. because:

> I realized that the job that I had worked so hard for and done very well at and proven myself over and over and over again, was never going to be enough, because - and also the fact that the chain of command had really let me down. I believed in that. I've always believed as a law enforcement officer, in justice and always believed that the Orange County Sheriff's Office was going to do the right thing, and I realized that wasn't going to happen that no matter how hard I worked, it just wasn't enough.

At 5:18 p.m., on the same date, approximately three hours after she submitted her letter of resignation, Director Ford offered her the position as SRO at Conway Middle School. Ms. Webb-Edwards testified that this offer was "too little too late."

Ms. Webb-Edwards testified that she sought counseling for her condition in May 2005 from a psychologist approximately six months after she resigned. The

psychologist referred her to Dr. Manuel Mota-Castillo who is a psychiatrist.

Dr. Mota-Castillo testified that he first treated Ms. Webb-Edwards in May 2005. He testified that "she told me that for one year she has been trying to stop worrying about what happened at work." His notes revealed that she stated: "Emotionally I have been a wreck. Not sleeping due to worries." Based on her history, Dr. Mota-Castillo diagnosed her as having an adjustment disorder with mixed emotional conditions due to her situation at work. He testified that an adjustment disorder is a transient event. Dr. Mota-Castillo stated that her prognosis was guarded because "she will need to find a solution to her situation for her mental status to change." Dr. Mota-Castillo prescribed some medicine to help her cope with stress and depression.

Ms. Webb-Edwards told Dr. Mota-Castillo that "she was more interested in an apology than in getting money, that she would be frustrated if she just got a payment and no apology." Dr. Mota-Castillo could not recall whether she told him that she was offered a SRO position on the day she announced her resignation. Dr. Mota-Castillo saw her four or five times between May 13, 2005, and November 16, 2005.

Gus Bextram testified that he supervised Ms. Webb-Edwards for a year and a half in 1993 and 1994 while she worked as a patrol officer at the Winter Park Police Department. He testified that she handled herself very well when she arrested a suspect who had a criminal history of violence. At the time of trial, Mr. Bextram was a coordinator for the criminal justice program at

Seminole Community College. He served as a SRO officer for two years while he was a member of the Winter Park Police Department. He stated that the most important qualification for being a SRO is "to communicate with children." He opined that an officer does not have to have military or SWAT team experience to serve as a SRO. Mr. Bextram testified he had never been a SRO at Gateway Middle School.

Laury Ralph Edwards, Ms. Webb-Edwards's husband, testified on her behalf. At the time of trial, he had served as a deputy sheriff for the Orange County Sheriff's office for almost thirteen years. He testified that his wife had always wanted to be a SRO because she wanted to be involved with children, to take part in extracurricular activities, and utilize the skills she had learned as a campus advisor and coach before she became a law enforcement officer.

D

The trial in this matter commenced on March 19, 2007. After Ms. Webb-Edwards rested her case in chief, the County made an oral motion pursuant to Rule 50(a) for judgment as a matter of law for dismissal of the gender discrimination claim and the constructive discharge claim that was presented in the cause of action for retaliation. The District Court granted the oral motion regarding the constructive discharge claim. The District Court informed counsel that it would reserve making a ruling on the Rule 50(a) motion regarding the gender discrimination claim until after the jury rendered its verdict. The jury returned a verdict for Ms. Webb-Edwards on the gender discrimination claim in the amount of $ 500,000. Seventy-five thousand

dollars was awarded for economic damages, and $ 425,000 was awarded for compensatory damages. After excusing the jury, the Court permitted Sheriff Beary to supplement his Rule 50(a) motion in writing.

On March 30, 2007, the County submitted a written motion for a directed verdict on her gender discrimination claim pursuant to Rule 50(a). It asserted in its motion that Ms. Webb-Edwards's gender discrimination claim should be dismissed because she did not prove that she suffered an adverse employment action when she was passed over for the SRO position at Gateway Middle School. The County requested that if the Court denied the Rule 50(a) motion, it should enter judgment as a matter of law dismissing the award of economic damages.

Ms. Webb-Edwards filed a motion for reconsideration of the dismissal of the constructive discharge claim on April 3, 2007. On April 12, 2007, she filed an opposition to the County's written motion for a directed verdict and its motion to alter or amend the verdict, or in the alternative, for a new trial. On May 4, 2007, the District Court granted the County's Rule 50(a) motion for judgment as a matter of law and dismissed as moot its motion to alter or amend the verdict. It also denied Ms. Webb-Edwards's motion to reconsider the dismissal of her constructive discharge claim. On May 7, 2007, the clerk entered the District Court's judgment dismissing this action on the merits and awarding costs to the County. On June 1, 2007, Ms. Webb-Edwards filed a notice of appeal from the final judgment entered on May 7, 2007, granting judgment in favor of the County, and the order granting its motion for summary

judgment entered on February 27, 2007. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II

Ms. Webb-Edwards asserts that the District Court committed reversible error in granting summary judgment in favor of the County regarding her sexual harassment and retaliation claims. We review a district court's grant of summary judgment *de novo*, viewing the evidence in the light most favorable to the party opposing the motion. *See Skrtich v. Thornton*, 280 F.3d 1295, 1299 (11th Cir. 2002).

> Summary judgment should be granted only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Springer v. Convergy Customer Management Group, Inc., 509 F.3d 1344, 1347 (11th Cir. 2007) (internal quotation marks omitted).

A

Ms. Webb-Edwards contends that the District Court erred in concluding that Sgt. Mankewich's conduct was not sufficiently severe and pervasive to alter the terms and conditions of her employment and create an abusive and hostile work environment. Title VII provides that it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any

individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privilege of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). "Sexual harassment is a form of sex discrimination prohibited by Title VII," *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 582 (11th Cir. 2000).

An employee must present evidence of the following elements to support a cause of action for a hostile environment claim created by sexual harassment:

> (1) that he or she belongs to a protected group; (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment must have been based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable.

Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999) (en banc).[2]

Ms. Webb-Edwards belongs to a protected group. The District Court correctly rejected as frivolous the County's contention that Sgt. Mankewich's comments to Ms. Webb-Edwards were not based on her gender. The evidence, when reviewed in the light most favorable to her, demonstrates Sgt. Mankewich's statements and conduct were unwelcome. She presented evidence that she told him to stop and that

he was sick. Sgt. Mankewich's statements that she looked hot, that she should wear tighter clothes, that he wished his wife wore hot clothes, and his vulgar comment about lunch were unmistakenly gender based. It is undisputed that Sgt. Mankewich was Ms. Webb-Edwards's supervisor. Thus, Ms. Webb-Edwards clearly demonstrated that she satisfied the first, second, third, and fifth elements of her cause of action for hostile environment and sexual harassment.

Ms. Webb-Edwards asserts that the evidence she offered in opposition to Appellee's motion for summary judgment demonstrates that there are genuine issues of material fact in dispute regarding whether Sgt. Mankewich's sexual comments were sufficiently severe and pervasive to alter the terms and conditions of her employment.

> [W]hether an environment is hostile or abusive can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.*Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993).

Before this Court, the County does not dispute that Sgt. Mankewich's comments were discriminatory. Sgt. Mankewich made gender related comments on at least a weekly basis, over an eight-week period. The record also shows, however, that when Ms. Webb-Edwards told Sgt. Mankewich on April 20, 2004, that his

comments made her feel uncomfortable, his discriminatory conduct ceased. Furthermore, when she reported to Lt. McKinley that Sgt. Mankewich's comments were unwelcome, she was immediately and temporarily moved to a different workplace while her complaint was investigated.

After attending two meetings with her supervisors and Sgt. Mankewich, Ms. Webb-Edwards agreed to return to her former workplace under Sgt. Mankewich's supervision. Her employer was not informed of Sgt. Mankewich's reprehensible comment about eating Ms. Webb-Edwards for lunch until her husband informed Sgt. Strange about that behavior on or about May 10, 2004. The day after receiving Sgt. Strange's *memorandum*, Director Ford met with Ms. Webb-Edwards. Director Ford told her she could remain in Sector I under Sgt. Mankewich's supervision or transfer to Sector 3 with no change in her salary or work shift. She elected to accept a transfer to Sector 3 so that she would not be supervised by Sgt. Mankewich. She also requested that Sgt. Mankewich apologize for his gender based comments in writing. Her request was granted. She was transferred to Sector 3 and Sgt. Mankewich apologized in writing.

Sgt. Mankewich's comments that Ms. Webb-Edwards "looked hot," and that she should wear tighter clothing, and women who dye their hair have issues at home were taunting and boorish. They were not, however, physically threatening or humiliating. Sgt. Mankewich never touched her or attempted to do so. For conduct to be severe or pervasive, the work environment must be one that a reasonable person would find hostile or

abusive. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).

The Supreme Court has cautioned against expanding Title VII into "a general civility code." *Id.* at 81. The Court instructed in *Oncale* that

> The statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace, it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment.

Id.

We are persuaded that a reasonable person would not consider Sgt. Mankewich's comments about Ms. Webb-Edwards's figure and good looks severely hostile or abusive. Ms. Webb-Edwards has failed to demonstrate that Sgt. Mankewich's inappropriate comments about Ms. Webb-Edwards's appearance unreasonably interfered with her work performance or the terms and conditions of her employment.

Sgt. Mankewich's taunting jest about eating Ms. Webb-Edwards for lunch is more troubling. It was directed at her husband in Ms. Webb-Edward's presence. The record shows, however that she did not report it to Lt. McKinley on April 21, 2004, when she complained about Sgt. Mankewich's unwelcome comments about her appearance. Her husband made a report of the lunch

comment on June 10, 2004. Furthermore, it is the only comment that could be construed as referring to sexual activity involving Ms. Webb-Edwards. It was rather clearly a disgusting attempt at humor, unaccompanied by any other improper conduct.

The Supreme Court held in *Faragher v. Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), that "offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." In *Gupta*, this Court noted that:

> [a]ll the sexual hostile work environment cases decided by the Supreme Court has involved patterns or allegations of extensive, long lasting, unredressed and uninhibited sexual threats or conduct that permeated the plaintiff's work environment.

Gupta, 212 F.3d at 586 (quoting *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 (5th Cir. 1999)). In this matter, the record shows that Ms. Webb-Edwards's employer took immediate action to redress her grievances by granting her request to be transferred to a different office and required Sgt. Mankewich to apologize for his behavior.

After looking at the totality of the circumstances independently, we agree with the District Court that Ms. Webb-Edwards failed to demonstrate that Sgt. Mankewich's boorish remarks were not severe or pervasive. They did not alter the terms and conditions of her employment. The District Court did not err in

granting summary judgment on Ms. Webb-Edwards's sexual harassment claim.

B

Ms. Webb-Edwards further contends the District Court erred in concluding that she failed to demonstrate that she was not transferred to Gateway Middle School in retaliation for the fact that she complained about Sgt. Mankewich's gender related comments. The District Court held that she failed to present evidence that the failure to transfer her to a SRO position at Gateway Middle School was causally related to the prior exercise of her statutorily protected rights under Title VII to complain about workplace harassment. "[T]o establish a prima facie case of retaliation under 42 U.S.C. § 2000e - 3(a), a plaintiff must show that (1) she engaged in statutorily protected expression; (2) she suffered an adverse employment action; and (3) the adverse action was causally related to the protected activity." *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998).

Ms. Webb-Edwards complained to Lt. McKinley on April 21, 2004, about Sgt. Mankewich's comments about her appearance and clothes. On October 25, 2004, Ms. Webb-Edwards was informed by an employee of the Human Resources Division that the Piedmont Lakes SRO position had been filled but that the list was still open for future transfers. Accordingly, approximately six months elapsed between the date Ms. Webb-Edwards first complained about Sgt. Mankewich's unwelcome comments and the date she was noted that she was passed over for transfer to Gateway Middle School.

The record shows that Chief Hollomon deviated from the transfer board's ranking because he was concerned that female officers or small male officers would be subject to violent physical assaults by the many disturbed students at Gateway Middle School. Division Chief Hollomon was aware that Ms. Webb-Edwards had complained about workplace harassment. No evidence was presented by Ms. Webb-Edwards that Chief Hollomon's testimony that his motivation for deviating from the transfer board's ranking of Ms. Webb-Edwards was false or pretextual. Instead, she relies on the close temporal connection between the two events to demonstrate the element of causal connection. The Supreme Court noted in *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001), that:

> the cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be "very close," *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (C.A.10 2001). See, e.g. *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (C.A.10 1997) (3-month period insufficient); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-1175 (C.A.7 1992) 4-month period insufficient). Action taken (as here) 20 months later suggests by itself, no causality at all.

Id.

Here, Division Chief Hollomon's decision to pass over Ms. Webb-Edwards in filling the position of SRO at

Gateway Middle School came approximately six months after she complained of a hostile work environment because of sexual harassment. The District Court did not err in dismissing Ms. Webb-Edwards's retaliation claim. Ms. Webb-Edwards failed to meet her burden of presenting evidence of a causal connection between her complaint about Sgt. Mankewich's inappropriate comments and to Chief Hollomon's decision not to transfer her to Gateway Middle School.

III

Ms. Webb-Edwards also contends that the District Court erred in granting Appellee's motion to dismiss her gender discrimination and constructive discharge claims pursuant to Rule 50(a) of the Federal Rules of Civil Procedure.

> Our review of a grant of a Rule 50(a) motion for judgment of a matter of law is *de novo*; we apply the same standard that the district court applied in addressing the motion. In doing so, we consider all the evidence in the light most favorable to the non-moving party, and independently determine whether the facts and inferences point so overwhelmingly in favor of the movant . . . that reasonable people could not arrive at a contrary verdict.
>
> The non-moving party must provide more than a mere scintilla of evidence to survive a motion for summary judgment as a matter of law. If the non-moving party failed to make a showing on an essential element of his case with respect to

> which he had the burden of proof, then the entry of judgment as a matter of law is appropriate.

Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1308 (11th Cir. 1998) (internal quotation marks and citation omitted).

A

Ms. Webb-Edwards maintained that the County waived the right to raise the absence of the adverse employment action element of its *prima facie* case because it failed to raise this issue in its oral Rule 50(a) motion after Ms. Webb-Edwards had presented its case in chief. Ms. Webb-Edwards contends that the County did not assert that she had failed to demonstrate that she had suffered an adverse employment action until it filed its written Rule 50(a) motion after the jury returned its verdict. She argues that the failure of the County to include in its oral motion the law and facts that entitled it to judgment as a matter of law violated the mandatory provisions of Rule 50(a)(2). Rule 50(a)(2) provides that: "The motion must specify the judgment sought and the law and facts that entitled the movant to the judgment."

Ms. Webb-Edwards correctly argues that this specificity requirement is necessary to protect the right of the non-moving party to correct deficiencies in the evidence before the case is submitted to the jury. *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1289 (11th Cir. 1998). The County maintains that Ms. Webb-Edwards forfeited her right to require it to specify the law and facts that it was entitled to judgment as a matter of law by failing to object when the District

Court interrupted the County's oral Rule 50(a) motion and ordered that it would not rule on the gender discrimination claim until after the jury returned its verdict. [3]

> In general, the law ministers to the vigilant, not to those who sleep upon perceptible rights. Consequently, a litigant who deems himself aggrieved by what he considers to be an improper occurrence in the course of trial or an erroneous ruling by the trial judge ordinarily must object then and there, or forfeit any right to complain at a later time. The policy reasons behind the raise-or-waive rule are rock solid: calling a looming error to the trial court's attention affords an opportunity to correct the problem before irreparable harm occurs. Then, too, the raise-or-waive rule prevents sandbagging; for instance, it precludes a party from making a tactical decision to refrain from objecting, and subsequently, should the case turn sour, assigning error (or, even worse, planting an error and nurturing the seed as insurance against an infelicitous result). So viewed, the requirement that parties raise contemporaneous objections to improper questions, comments, and the like serves an important purpose in promoting the balanced and orderly functioning of our adversarial system of justice.

United States v. Taylor, 54 F.3d 967, 972 (1st Cir. 1995) (internal quotation marks omitted). This Court has recognized only two exceptions to this forfeiture rule: "first, where a party has made its position clear to the court previously and further objection would be futile;

and second, where it is necessary to correct a fundamental error or prevent a miscarriage of justice. *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999) (internal quotation marks omitted).

Ms. Webb-Edwards has not invoked the plain error rule to justify its failure to object to the District Court's failure to order the County to comply with the requirements of Rule 50(a)(2). Instead, Ms. Webb-Edwards contends that the evidence she presented in her case in chief was sufficient to demonstrate that passing over Ms. Webb-Edwards was an adverse employment action. We are persuaded that Ms. Webb-Edwards has forfeited her right to challenge the County's contention on appeal that the evidence is insufficient to show that she suffered an adverse employment action.

B

Ms. Webb-Edwards seeks reversal of the District Court's order granting judgment as a matter of law regarding her gender discrimination claim. To prove the elements of a cause of action for gender discrimination, a plaintiff must demonstrate four things: "(1) that she was a member of a protected class, (2) that she was qualified for the job, (3) that she suffered an adverse employment action, and (4) that she was displaced by someone outside the protected class." *Hinson v. Clinch County, Ga. Bd. of Educ.*, 231 F.3d 821, 828 (11th Cir. 2000).

The Supreme Court has defined an adverse employment action as follows: "A tangible employment action constitutes significant change in employment

status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). This Court held in *Davis v. Town of Lake Park Fla.*, 245 F.3d 1232, 1238 (11th Cir. 2001), that "not all conduct by an employer negatively affecting an employee constitutes adverse employment action." This Court also held in *Davis* that:

> to prove adverse employment action in a case under Title VII's anti-discrimination clause, an employee must show a *serious and material* change in the terms, conditions, or privileges of employment. Moreover, the employee's subjective view of the significant adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances.

Id. at 1239.

Ms. Webb-Edwards contends that the District Court erred in concluding that an assignment to the position at Gateway Middle School would have resulted in a lateral transfer that "did not represent a serious and material change in the pay, prestige, or responsibility of Plaintiff's employment with Defendant." Order Granting Rule 50(a) Mot., May 4, 2007, at 10. [4]

In *Gupta*, this Court held that "[w]hether an action is sufficient to constitute an adverse employment action must be determined on a case by case basis." *Gupta*, 212

F.3d at 587. The record shows that Ms. Webb-Edwards successfully applied for a transfer to the position of a SRO to fill a vacancy at any school.

She testified she applied because it was her intention to become a SRO at Sea Breeze High School when she entered the police academy in 1995.

Commander Chatman testified that a deputy can be transferred to any SRO position that becomes available. If, however, a deputy who rejects a transfer to an available school is taken off the eligibility list to avoid "shopping around." Commander Chatman testified that at schools other than Gateway Middle School, a SRO's duties include teaching "gang resistance" to the students. She also testified that a SRO does not have time to teach. A SRO's job duties at Gateway Middle School are different from schools such as Conway Middle School because the SRO is engaged full time in breaking up fights on school grounds. She also stated that a majority of the students at Gateway Middle School have "criminal charges" and psychological or behavioral problems, as well as being on medication. Commander Chatman had previously recommended that two deputies be assigned to Gateway Middle School "for safety reasons."

Chief Hollomon testified that he deviated from the eligibility ranking submitted by the transfer review board because he believed that she was not qualified to serve as a SRO at Gateway Middle School because of its "very unique situation" when compared to other schools. He stated that she did not have the "physical stature and tactical background and training" to handle fourteen to twenty-two year-old students with severe

behavioral and medical problems as well as criminal records for violent crimes. He testified that forty-three students had been arrested on the Gateway Middle School campus for battery on a law enforcement officer. In his opinion, Ms. Webb-Edwards would not have been safe as the lone SRO at Gateway Middle School. He testified that his sole intention in deviating from the transfer ranking was to "protect Elaine [Webb-Edwards]."

This Court held in *Increase Minority Participation by Affirmative Change Today, Inc. v. Firestone*, 893 F.2d 1189, 1194 (11th Cir. 1990), that a discrimination regarding which applicant is the best qualified for a position can be based on a comparison of personal and "technical training" characteristics. In passing over Ms. Webb-Edwards, Chief Hollomon relied on his comparison of her small stature and her lack of SW AT experience with Deputy Sheriff Leone's larger physical size and his service on a SW AT team whose primary duty is to capture armed or assaultive suspects.

When Ms. Webb-Edwards was passed over from being transferred to Gateway Middle School, she remained on the list for transfer to the next vacancy. She was offered the position of SRO at Conway Middle School. Unlike the dangerous conditions facing a SRO on a daily basis at Gateway Middle School, the SRO at Conway Middle School has the opportunity to counsel, mentor, and teach, as well as act as a coach in after-school activities. Chief Hollomon's deviation from the transfer review board's ranking of SRO candidates did not affect Ms. Webb-Edwards's eligibility to be transferred to a SRO position at a school other than Gateway Middle School. In fact, she was offered a

transfer to Conway Middle School approximately fifteen days after she was notified that she would not be transferred to Gateway Middle School. Thus, she refused to accept a transfer to a school that would have provided her with a safe environment and the ability to teach and coach an athletic team. Her refusal to accept a transfer to Conway Middle School made her ineligible to accept a SRO position based on the current eligibility ranking of applicants.

The evidence regarding the physical danger faced by a SRO at Gateway Middle School was not disputed by Ms. Webb-Edwards, nor was the fact that her desire to teach and participate in school activities was not possible at that school. There is no evidence in the record that a reasonable person faced with a choice of remaining as a property detective with an occasional encounter with a perpetrator resisting arrest would prefer being transferred to a position where she faced the daily threat of being physically assaulted at a school populated by students as old as twenty-two, the majority of whom had been placed at that school because of their criminal activity and their disturbed medical condition.

The record in this case does not demonstrate that passing over Ms. Webb-Edwards resulted in a serious and material change in the terms, conditions, and privileges of employment. Her wages, benefits, or rank were not affected. More importantly, a transfer to Gateway Middle School would have placed her in constant danger of physical assault. She did not present any evidence that she faced less of a threat of harm in her position as a property detective.

Ms. Webb-Edwards's reliance on *Alvarado v. Texas Rangers*, 492 F.3d 605 (5th Cir. 2007), is misplaced. In *Alvarado*, the Fifth Circuit reversed the district court's grant of summary judgment because it concluded there was sufficient evidence that the position of Texas Rangers was a promotion because it was more prestigious than that of being a sergeant in the Special Crimes Service Division of the Department of Public Safety. *Id.* at 614-15. Here, no evidence was presented that service as a SRO at a school such as Gateway Middle School where the total responsibility of a SRO is to spend each day breaking up fights and attempting to avoid violent assaults, is more prestigious than serving as a property detective who may be required on an occasional basis to capture a suspect who attempts to escape arrest.

Accordingly, we conclude that Ms. Webb-Edwards has failed to demonstrate that Chief Hollomon's deviation from the transfer review board's rank was an adverse employment action. The District Court did not err in granting the County's Rule 50(a) motion to dismiss Ms. Webb-Edward's gender discrimination claim.

IV

The County has cross-appealed from the District Court's alternative order of awarding Ms. Webb-Edwards $ 50,000 in the event that this Court should disagree with the entry of a Rule 50(a) judgment as a matter of law regarding her gender discrimination claim. Because we have determined that the District Court did not err in granting the County's Rule 50(a) motion, we dismiss the County's cross-appeal as moot.

Conclusion

The summary judgment granted in favor of the County on Ms. Webb-Edwards's sexual harassment and retaliation claims is AFFIRMED. The order granting judgment as a matter of law on her gender discrimination claim is also AFFIRMED. The County's provisional cross-appeal is DISMISSED as moot.

Footnotes

*Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation

[1]Ms. Webb-Edwards has not appealed from the dismissal of the negligent retention claim.

[2][A]n employer may be vicariously liable for actionable hostile environment discrimination caused by a supervisor with immediate or successively higher authority over the employee-subject to an affirmative defense." *Mendoza*, 195 F.3d at 1245 n.4.

[3]In its written Rule 50(a) motion, the County asserted that the District Court should enter judgment as a matter of law because Ms. Webb-Edwards failed to demonstrate that she suffered an adverse employment action.

[4]In its order granting the County's Rule 50(a) motion, the District Court concluded that Ms. Webb-Edwards demonstrated direct evidence of gender discrimination. During oral argument, counsel for the County conceded that the evidence of gender discrimination was sufficient.

3/20/2007
Case No. 6:05-cv-1149-Orl-22KRS

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ELAINE WEBB-EDWARDS,
Plaintiff,

-vs-

KEVIN BEARY, in his official capacity as
Orange County Sheriff,
Defendant.

JURY VERDICT

VERDICT FORM

The jury must unanimously agree on the answers to all of the questions.

DISCRIMINATION

Do you find from a preponderance of the evidence:

1. That the Plaintiff was subjected to an adverse employment action by the Defendant based on her gender when she was bypassed for the SRO position at Gateway Middle School?

Answer: Yes

(If You Answered No To Question l, You Need Not

Answer the remaining questions, and instead simply sign the verdict form).

2. That the Plaintiff's gender was a substantial or motivating factor that prompted the Defendant to take that action?

Answer: Yes

(If You Answered Yes to Both 1 and 2 above, please Answer Question 3. If You answered No to Either Question 1 or 2, you need not answer the remaining questions, and instead simply sign the verdict form).

3. That the Plaintiff would have been bypassed for the Gateway Middle School SRO position for other reasons even in the absence of gender as a motivating factor?

Answer: No

(If your answer is Yes to Question No. 3, your verdict is for the Defendant. You need not answer the remaining questions, and instead simply sign the verdict form. If your answer is No to Question No. 3, your verdict is for the Plaintiff.)

DAMAGES

If you have found in favor of the Plaintiff on the preceding claim please answer questions 13 below. If you found in favor of Defendant on the preceding claim, please do not answer questions 1-3 below, and instead simply sign the verdict form.

1. Should the Plaintiff be awarded damages to compensate for loss of wages and benefits from her last date of employment to the date of trial?

Answer: Yes

If your answer to Question No. 1 is Yes, in what amount?

Answer: $150,000

2. Has the Plaintiff failed to mitigate her damages by rejecting the SRO position at Conway Middle School, and/or failing to search for comparable law enforcement employment subsequent to her resignation?

Answer: Yes

If your answer is Yes, in what amount should the damages, if any, be reduced?

Answer: $75,000

3. Should the Plaintiff be awarded damages to compensate for emotional pain and mental anguish?

Answer: Yes

4. If your answer to Question No. 3 is Yes, in what amount?

Answer: $425,000.00

5/4/2007
Case No. 6:05-cv-1149-Orl-22KRS

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ELAINE WEBB-EDWARDS,
Plaintiff,

-vs-

KEVIN BEARY, in his official capacity as
Orange County Sheriff,
Defendant.

ORDER

I. INTRODUCTION

This cause comes before the Court for consideration of Defendant's, Kevin Beary, in his official capacity as Orange County Sheriff, Motion for Directed Verdict (Doc. 64), filed March 30, 2007, to which Plaintiff, Elaine Webb-Edwards, has responded (Doc. 66); Defendant's Motion to Alter or Amend the Verdict (Doc. 63), filed March 30, 2007, to which Plaintiff has responded (Doc.67); Plaintiff's Motion for Reconsideration of Dismissal of Constructive Discharge (Doc. 65), filed April 3, 2007, to which Defendant has responded (Doc. 68). After carefully considering these matters, the Court GRANTS Defendant's Motion for Directed Verdict (Doc. 64), DENIES AS MOOT Defendant's Motion to Alter or Amend the Verdict (Doc. 63), and DENIES Plaintiff's Motion for Reconsideration of

Dismissal of Constructive Discharge (Doc. 63).

II. BACKGROUND

Defendant hired Plaintiff in July 1995 as a deputy sheriff. As of May 23, 2004, Plaintiff worked in Sector 3 of the property division as a detective, under the supervision of Sgt. Long. In the Fall of 2004, Plaintiff applied for a position as a school resource officer ("SRO").

A SRO is assigned to a middle or high school to deal with any problems arising from students at that school. To be eligible for a position as a SRO, the officer must submit an application through her chain of command, demonstrate that she meets the minimum requirements, interview with a transfer panel, and only then be placed on an eligibility list in a ranked order. Plaintiff finished the application process ranked second amongst all the applicants.

Plaintiff did not apply for a SRO position with a specific school in mind; but instead, she went through the process because it was her dream to work as a SRO. The applicant ranked first went to the position that was immediately available. Shortly after that position was filled, another position at Gateway Middle School became available.

Instead of placing Plaintiff in that position, James Hollomon, the division chief in charge of training and accreditation who was also responsible for SRO placement, deviated from the rankings. Chief Hollomon considered Gateway to be a dangerous school. Gateway had a high number of fights and disturbances. Even

though it was a middle school, mentally handicapped adults attended school there.

Against that backdrop, Chief Hollomon decided it was too dangerous to station a female officer at Gateway. He wanted to put a big male, who could physically handle himself in the position. Chief Hollomon admitted that there was no written policy stating that female officers could not work at Gateway Middle School. Chief Hollomon requested that the third highest applicant, John Leone, on the SRO rankings be selected. Chief Hollomon did not know much about Plaintiff or Leone. He did know that Leone spent a lot of time working out at the gym. Leone turned the job down.

Chief Hollomon then asked for permission to assign to Gateway Deputy Trevor Vickers, an officer who did not even apply for a SRO opening. Chief Hollomon admitted that he did not know if Vickers even knew about the position. Consequently, he would have had no way of knowing if Vickers met the basic requirements to have qualified for the position.

On October 25, 2004, Plaintiff was issued a letter informing her that she had not been selected for the Gateway SRO position. However, coworkers apprised Plaintiff of the bypass several weeks prior. On October 22, 2004, Plaintiff attempted to contact Director Ford, the supervisor whom she dealt with regarding previous sexual harassment claims, about being bypassed. In a vague single sentence email to Director Ford, Plaintiff stated that she had some issues that she wanted to discuss with him.

The next week she brought her concerns about the

Gateway position to Julia Chatman, the supervisor of middle school SRO positions. Chatman believed that Plaintiff was capable of handling the position at Gateway. She was concerned by Chief Hollomon's deviation from the rankings and thought that bypassing Plaintiff was inequitable. Chatman confirmed that offering the Gateway position to Vickers constituted a deviation from policy. Chatman's concerns aside, another officer was assigned to the Gateway SRO position. Plaintiff testified that Chatman told her the Gateway position was the only SRO positions available at that time.

On November 9, 2004, Plaintiff tendered her letter of resignation to Director Ford. At some point later that day, Chatman offered Plaintiff a SRO position at a different school, Conway Middle School. Plaintiff maintained her decision to resign and did not accept the offer. However, Plaintiff's resignation was not immediate: she stayed on as a detective with Defendant for two months. Plaintiff never made a formal complaint about gender discrimination.

She brought a suit against Defendant in this Court. In her complaint, Plaintiff asserted claims for both sexual harassment and retaliation, in addition to the gender discrimination claim.[1] Defendant moved for and the Court granted summary judgment on the sexual harassment and retaliation claims. Defendant failed to move for summary judgment on the gender discrimination claim and, thus, the parties went to trial.

After a two day trial on March 19 and 20, 2007, the Jury returned a verdict against Defendant.[2] The Jury found: (1) that Plaintiff was subjected to an adverse

employment action by Defendant based on her gender when she was bypassed for the SRO position at Gateway Middle School, (2) that Plaintiff's gender was a substantial or motivating factor that prompted Defendant to take that action, and (3) that Plaintiff would not have been bypassed for the Gateway Middle School SRO position for other reasons even in the absence of gender as a motivating factor. Doc. 59 at 1-2, Jury Verdict Questions Nos. 1-3. The Jury awarded $150,000 in lost wages from her last date of employment to the date of trial, which the Jury then reduced by $75,000 for Plaintiff's failure to mitigate by rejecting the SRO position at Conway Middle School and failing to find comparable law enforcement employment subsequent to her resignation. Id. at 2. Additionally, the Jury awarded $425,000 in emotional pain and mental anguish.

At the close of Plaintiff's case-in-chief, Defendant moved for a Rule 50 directed verdict. The Court reserved ruling on the motion. Once the Jury returned its verdict the Court gave Defendant the option to argue its Rule 50 at that point or to file a written motion. Defendant opted for the latter. On March 30, 2007, Defendant filed a Motion for Directed Verdict pursuant to Rule 50 and a Motion to Alter or Amend the Verdict pursuant to Rule 59. On April 3, 2007, Plaintiff filed a Motion for Reconsideration of Dismissal of Constructive Discharge Claim.

III. ANALYSIS

Defendant has filed two motions seeking multiple avenues of relief. The Court begins its analysis focusing on Defendant's Rule 50 motion, more specifically, the

overriding issue in this case: whether failure to laterally transfer constitutes an adverse employment action.[3]

A. Defendant's Rule 50 Motion

On a Rule 50 motion, a court must consider "all the evidence in the light most favorable to the nonmoving party, and independently determine whether the facts and inferences point so overwhelmingly in favor of the movant ... that reasonable people could not arrive at a contrary verdict." Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1308 (11th Cir. 1998) (internal quotations omitted). The nonmoving party is not afforded the luxury of sitting idly by, but must produce "more than a mere scintilla of evidence to survive a motion for judgment as a matter of law. If the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof, then the entry of judgment as a matter of law is appropriate." Id. (internal quotations omitted). "Motions for directed verdict and for judgment notwithstanding the verdict need not be reserved for situations where there is a complete absence of facts to support a jury verdict. Rather, there must be a substantial conflict in evidence to support a jury question." Hipp v. Liberty Nat. Life Ins. Co., 252 F.3d 1208, 1230 (11th Cir. 2001).

Title VII dictates that it is unlawful to discriminate on the basis of gender in employment practices. 42 U.S.C. § 2000e. A plaintiff may prove her case through direct or circumstantial evidence.[4] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

In either case, a plaintiff must also show she suffered an

adverse employment action. Hipp, 252 F.3d at 1230 n. 34 (stating "[t]he plaintiff must show that an adverse employment action was taken against him regardless of whether he is relying on direct evidence of discrimination or employing the burden-shifting approach); Wright v. Southland Corp., 187 F.3d 1287, 1293 (1999) (stating "[i]n sum, the plaintiff in an employment discrimination lawsuit always has the burden of demonstrating that, more probably than not, the employer took an adverse employment action against him on the basis of a protected personal characteristic").

Although the Supreme Court discussed the scope of adverse employment action as it relates to retaliation claims recently in Burlington Northern and Santa Fe Ry. Co. v. White, 126 S.Ct. 2405 (U.S. 2006), its analysis does not apply to the instant case. "The Supreme Court made clear in that case that the standard defining an adverse employment action in the context of retaliation claim does not apply to a core Title VII discrimination claim." Wallace v. Ga. Dep't of Transp., 2006 WL 3626967 *2 (11th Cir. 2006) (citing Burlington, 126 S.Ct. at 2414.[5] Therefore, the Court turns to the existing standard.

The Eleventh Circuit does not employ a bright-line test to evaluate whether a plaintiff suffered an adverse employment action. Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1238 (11th Cir. 2001). However, the Circuit does state that "not all conduct by an employer negatively affecting an employee constitutes adverse employment action." Id.

There must be a showing of a threshold level of

substantiality for the discrimination to be cognizable. Id. This Circuit dictates that "an employee must show a serious and material change in the terms, conditions, or privileges of employment. Moreover, the employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." Id. at 1239 (emphasis from the original). Even though Title VII does not require a demonstration of financial harm, "the asserted impact cannot be speculative and must at least have a tangible adverse effect on the plaintiff's employment." Id.

In the instant case, Plaintiff's gender discrimination claim is predicated on Defendant's failure to transfer her to the SRO position at Gateway being an adverse employment action. But the facts belie Plaintiff's contention that Defendant's failure to transfer her to Gateway met the threshold for an adverse employment action.

In the fall of 2004, Plaintiff applied for a SRO position. At trial, Plaintiff admitted that she was not applying for a SRO position at a particular school. Likewise, she knew that there was no guarantee that she would be placed at a particular school. The application process culminated in her being placed on an eligibility list to be offered a SRO position at a school should a vacancy arise. Importantly, the SRO position at Gateway- a SRO position in general for that matter- was not a promotion from Plaintiff's then position as a property detective but a lateral transfer. The SRO position would not have changed Plaintiff's pay, benefits, or rank.

Plaintiff contends that the SRO position was not a lateral transfer. Instead, Plaintiff claims that attaining a SRO position was a competitive process. Plaintiff further attempts to distinguish the application for a SRO position from a lateral transfer because the SRO position entails special training, a willingness to work extra curricular activities, the ability to work with a principal, teachers and staff, and meet with groups of children. Plaintiff also points out that to be eligible for a SRO position the candidate must not have had a rating of below standard in the last two performance evaluations and the candidate must not have violated a policy within the previous twelve months where a suspension resulted in a loss of pay or benefits. Plaintiff concludes her distinction by stating that an applicant must appear before a transfer review board.

The Plaintiff is splitting hairs. There is no doubt that there are differences between a SRO position and a property detective. There are differences in qualifications and on the job requirements between any two positions. However, the law does not concentrate on any differences but serious and material ones. Davis, 245 F.3d at 1239. The differences listed by Plaintiff do not rise to the level of material and serious. The transfer to the SRO position was a lateral transfer.

The Court finds the analysis in Gonzalez v. Fla. Department of Highway Safety & Motor Vehicles, Div. of Highway Patrol, 237 F. Supp. 2d 1338, 1348 (S.D. Fla. 2002), persuasive in its discussion of lateral transfers. In Gonzalez, a state trooper alleged discrimination because his employer denied his request to transfer to the morning shift even though he had seniority. Id. On these facts the court determined:

> For there to be an adverse employment action for purposes of a prima facie case of discrimination in employment, there must be a serious and material change in the terms, conditions, or privileges of employment. See Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (1 lth Cir. 2001). A lateral transfer, that is a transfer which does not involve a demotion in form or substance, does not rise to the level of an adverse employment action. See Doe v. Dekalh County School Dist.,145 F.3d 1441, 1449 (1 lth Cir.1998). A transfer to a different position can be adverse if it involves reduction in pay, prestige or responsibility. See Hinson, 231 F.3d at 829. "The flip side of this coin would appear to be that a failure to transfer may constitute an adverse employment action if [the new position] entails an increase in pay, prestige or responsibility." Smith v. Alabama Dept. of Corrections, 145 F. Supp. 2d 1291, 1297 (M.D.Ala.2001) (quoting Morris v. Wallace Comm Y College, 125 F. Supp. 2d 1315, 1328 (S.D.Ala.2001)). In the present case, the Plaintiff has not alleged that a transfer to the morning shift would represent an increase in pay, prestige or responsibility. Therefore, this failure to transfer does not represent an adverse employment action for purposes of a prima facie case of discrimination in employment. Moreover, the Plaintiff was able to obtain the shift he wanted through the grievance process.

Gonzalez, 237 F. Supp. 2d at 1349. Similarly in the instant case, the lateral transfer to the SRO position at Gateway did not represent a serious and material

change in the pay, prestige, or responsibility of Plaintiff's employment with Defendant. Importantly, Plaintiff does not contend that the SRO position offered a difference in pay or rank. Plaintiff's arguments that the SRO position offers a difference in responsibilities is subjective and unavailing.

Plaintiff argues that Defendant waived its adverse employment argument, along with Defendant's Faragher argument. Plaintiff claims that Defendant, at the close of the evidence, made a Rule 50 motion on three grounds: (1) there was insufficient evidence of a constructive discharge, (2) that Chief Hollomon's decision would have been the same absent the discrimination, and (3) that Plaintiff had not proven any economic damages. Plaintiff contends that it is now too late for Defendant to argue, for the first time, its position on the adverse employment action.

Plaintiff is mistaken. The Court told the parties that it would hear the Rule 50 motions, of both parties, after the jury had deliberated. During the charge conference, the Court stated "we're going to do the jury instructions first and then we will take argument over what ever motions while the jury is deliberating since they have all been reserved." Doc. 64-2 at 3, transcript of charge conference, March 20, 2007. However during the discussion about the proposed jury instruction on constructive discharge, the Court decided to hear Defendant's Rule 50 motion solely as it pertained to the constructive discharge because the Court, through its research and analysis, had grave doubts as to the propriety of a constructive discharge instruction to the jury. The Court granted the motion as it pertained to constructive discharge.

The Court also invited Defendant to argue its Rule 50 motion as it pertained to damages. After hearing the arguments on damages, the Court reserved ruling. After the jury delivered its verdict, Court asked Defendant if it wanted to argue right then or if it wanted to present its argument in writing. Defendant chose the latter. As the Court had noted, the parties' Rule 50 motions had been reserved.[6] At no point, did Defendant waive its Rule 50 argument.

Plaintiff has not met the legal threshold of showing that Defendant subjected her to an adverse employment action. Without an adverse employment action, her claim of gender discrimination fails.

Alternatively, the chain of causation in Plaintiff's gender discrimination claim was broken when Defendant presented Plaintiff with a SRO position at Conway within a month of Plaintiff not being selected for the Gateway SRO position. As with the state trooper in Gonzalez whose claim was undermined by the fact that he ultimately received the shift he wanted, in the instant case any claim Plaintiff had vanished when she was offered a SRO position. Gonzalez, 237 F. Supp. 2d at 1349.

Importantly, the defendant in this case is not Chief Hollomon, an individual, but the Orange County Sheriff in his official capacity, an institution. An institution is only as competent as its human agents. Those agents, as any person, are prone to err. Once Defendant realized Chief Hollomon erred, it swiftly moved to rectify the error by offering the SRO position at Conway. The Court finds Defendant's actions in light of learning of its agent's mistake relevant to the

discrimination claim. The Court also finds Plaintiff's reaction to Defendant's offer relevant.

Inexplicably, Plaintiff turned down the job offer- one entailing the same responsibilities and same training as the SRO position at Gateway- even though Plaintiff did not apply for a SRO position with any particular school in mind. Plaintiff described obtaining a SRO position as her dream job. Plaintiff has failed to demonstrate that a reasonable person would have found the SRO position at Conway to be materially different from the position at Gateway. Plaintiff's only attempt to distinguish the two positions was that Conway would have been a longer drive for her. Adding minutes to a drive does not meet the threshold of a serious and material change.

In a perfect world, the Court would have had the opportunity to address this issue at summary judgment, before the Jury spent two days observing and then deliberating this case. But in a perfect world a defendant is not asleep at the wheel when briefing its summary judgment motion. Defendant in this case failed to address Plaintiff's gender discrimination claim at summary judgment. So the case proceeded to trial and it was only with Defendant's Rule 50 motion that the Court was first afforded an opportunity to analyze the legal deficiencies of the adverse employment action.

Defendant also asserts a Faragher defense. The Court does not have to reach the merits of this defense because it is predicated on the Court finding that there was not an adverse employment action. The Court has made that finding and that finding alone is fatal to Plaintiff's gender discrimination claim. The Court does not need to go a step further and analyze the

applicability of Defendant's Faragher defense. The Court acknowledges that Plaintiff attempted to create a hostile environment claim through her testimony, effectively stating that after Defendant passed over her for the Gateway SRO position the environment was so bad that she had to quit. But this incident does not constitute a hostile environment claim because it was a discreet act of discrimination. Plaintiff cannot claim that this one act by Defendant turned her working atmosphere into a hostile environment.[7]

Defendant also claims that Plaintiff is not entitled to backpay because she was neither terminated nor was she constructively discharged. Since Defendant raised this same issue along with an argument against the compensatory damages the Jury found in Defendant's Rule 59 motion the Court addresses the backpay issue in the section pertaining to Defendant's Rule 59 motion.

B. Plaintiff's Motion to Reconsider the Constructive Discharge Claim

Plaintiff filed a Motion for Reconsideration of Dismissal of the Constructive Discharge Claim. Plaintiff proposes that as an alternative to the failure to transfer constituting an adverse employment action, Defendant's failure to transfer led to Plaintiff's constructive discharge and that was an adverse employment action.

The Court rejected the constructive discharge theory during trial and Plaintiff has provided no reason for a change of course at this point. For a constructive discharge claim a plaintiff must show that the environment in which she worked was "so difficult that

a reasonable person would have felt compelled to resign." Pipkins v. City of Temple Terrace, Fla., 267 F.3d 1197, 1201 (11th Cir. 2001). A reasonable person would not have resigned when she did not receive a transfer that she knew was not guaranteed. It was her choice to quit. When she did not receive the transfer she was still working as a detective. Additionally, within a month of learning that she did not get the Gateway position, and two months before she finally quit working for Defendant, she was offered another SRO position. A reasonable person would not have felt compelled to resign in Plaintiff's situation. The Court denies Plaintiff's motion.

C. Defendant's Rule 59 Motion

In addition to its Rule 50 motion, Defendant has filed a motion for relief pursuant to Rule 59 to alter or amend the verdict or in the alternative a motion for a new trial. The Court has already granted Defendant's Rule 50 motion due to a lack of an adverse employment action. In its Rule 59 motion, Defendant argues the same adverse employment action position that it briefed in its Rule 50 motion. Therefore, the relief sought in Defendant's Rule 59 motion on the same grounds is moot. On the other hand, the Court has not had an opportunity to fully analyze Defendant's damages argument. Defendant argues that even if the Court enters judgment for Defendant in its entirety due to its Rule 50 motion, the Court should also specifically address the economic portion of the jury's verdict. The Court agrees that in the interest of thoroughness, or should the Eleventh Circuit disagree with this Court's Rule 50 analysis, the Court should address Defendant's Rule 59 motion.

The first issue is backpay, which starts at the time of the discriminatory employment action up to the date judgment is entered in a plaintiff's favor. Shealy v. City of Alhany,137 F.Supp.2d 1359, 1364 (M.D. Ga. 2001) (citing Nord v. United States Steel Corp., 758 F.2d 1462, 1473 (11th Cir. 1985)). "However, when an employee voluntarily quits his job, the employer's liability for backpay usually ends. In order to be eligible for back pay after one leaves their employer, the employee must prove that he or she was 'constructively discharged."' Id. (citing Morrison v. Genuine Parts Co., 828 F.2d 708, 710 (11th Cir. 1987)).

Defendant argues that since Plaintiff was not fired or constructively discharged, Defendant should not be liable for backpay to Plaintiff. Plaintiff argues that the Civil Rights Act of 1991 allowed for compensatory damages. Regarding backpay, Defendant contends that Plaintiff should not be entitled to it because she voluntarily left her job. In fact, she not only left her job as a property detective but she also turned down a SRO position at Conway. As the Court found in regards to constructive discharge, a reasonable person, in Plaintiff's situation, would not have considered being bypassed for the Gateway position a constructive discharge. Plaintiff voluntarily left her j ob. She is not entitled to back pay.

Moreover, Defendant immediately redressed Plaintiff being passed over for the Gateway position by offering her the Conway SRO position.

> As a general rule, "a Title VII claimant's rejection of a defendant's job offer normally ends the defendant's ongoing responsibility for back

> pay.... As the Supreme Court has noted, such a rule "encourage[s] Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into 'voluntary compliance' and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace."

Lewis v. Federal Prison Indus., Inc., 953 F.3d 1277, 1279 (11th Cir. 1992) (quoting Ford Motor Co. v. EEOC, 458 U.S. 219 228 (1982)). Defendant's responsibility for backpay ended when Plaintiff rejected Defendant's offer for the Conway SRO position. Plaintiff was still working for, and hence receiving a paycheck from, Defendant when she rejected the Conway SRO position. Therefore, she is not entitled to any backpay.[8]

Next, Defendant contests the Jury's award of $425,000 in compensatory damages. At the outset Defendant asserts, and Plaintiff agrees, that Title VII caps compensatory and punitive damages to $300,000. The appropriateness of the amount of compensatory damages is analyzed through the consideration of three factors: "(1) the size of the award; (2) the rational relationship between the award and the evidence adduced at trial; and (3) awards in similar cases." Copley v. BAX Global, Inc., 97 F.Supp.2d 1164,1172 (S.D. Fla. 2000). As to the first element, $425,000 is a substantial award.

Plaintiff introduced evidence from several witnesses regarding the emotional impact on Plaintiff after she was not selected for the Gateway SRO position. In fact, there were at least six witnesses who commented on

Plaintiff's emotional state after not obtaining the Gateway position. But none of these witnesses could rebut the fact that within a month of Plaintiff discovering that she had been passed over for the Gateway position, she was offered an identical position at another school. Any emotional trauma inflicted on Plaintiff within that month is de minimis. Defendant quickly rectified the wrong one of its agents committed by offering her the Conway position. Plaintiff chose not to accept Defendant's offer of the Conway position. Any pain suffered after Plaintiff rejected the Conway offer cannot be accredited to Defendant.

Moreover, $300,000, not to mention $425,000, is far beyond any reasonable award in similar cases in this Circuit. It is rare that courts allow awards for mental anguish or emotional distress of more than $150,000 to stand. Copley., 97 F.Supp.2d at 1172; Hurley v. Atlantic City Police Dept., 933 F.Supp. 396, 423 (D. N.J. 1996); but see Hudson v. Chertoff, 473 F.Supp.2d 1286,1291-92 (finding the reduction of a jury award of $1.5 million to the statutory cap of $300,000 to be sufficient and that further reduction was not warranted where plaintiff suffered emotional pain over a three year period). But even $150,000 is too great an award for the facts adduced in this case. Plaintiff suffered the wrong of not receiving the Gateway SRO for less than a month. Within two weeks of Plaintiff informing Director Ford and Commander Chapman that she was bypassed for the Gateway position, they offered her the Conway position. The Court finds that $50,000 is an appropriate amount for an award for Plaintiff's several weeks worth of suffering.

IV. CONCLUSION

As a matter of law, Plaintiff's gender discrimination claim fails because Plaintiff cannot show that she was subjected to an adverse employment action. The Plaintiff must have a valid claim for the Plaintiff to receive damages. Since the Plaintiff's gender discrimination claim fails she is left without any valid claims. Therefore, she cannot recover damages. In the alternative, should Defendant not be entitled to its Rule 50 motion, the Court grants Defendant's Rule 59 motion as it pertains to damages. The Court concludes that backpay is not appropriate in this case and that a proper compensatory damages award would be $50,000.

Based on the foregoing, it is ORDERED as follows:

1. Defendant's, Kevin Beary, in his official capacity as Orange County Sheriff, Motion for Directed Verdict (Doc. 64), filed March 30, 2007, is GRANTED.
2. Defendant's Motion to Alter or Amend the Verdict (Doc. 63), filed March 30, 2007, is DENIED AS MOOT.
3. Plaintiff's, Elaine Webb-Edwards, Motion for Reconsideration of Dismissal of Constructive Discharge (Doc. 63), filed April 3, 2007, is DENIED.
4. The Clerk shall enter a final judgment providing that Plaintiff, Elaine WebbEdwards, shall take nothing on her claims against the Defendant, Kevin Beary in his official capacity as Orange County Sheriff. The judgment shall further provide that the Defendant shall recover its costs arising from this action..
5. All other Pending motions are DENIED as moot.
6. The Clerk shall close the case.

DONE and ORDERED in Chambers, in Orlando,

Florida on May 4, 2007.

Footnotes

[1]The facts underlying the sexual harassment and retaliation claims were not before the jury and, therefore, not included in this Order.

[2]During the trial, the Court found as a matter of law that there was not enough evidence for a constructive discharge claim.

[3]The Court acknowledges that the Jury made a factual determination that the Plaintiff was subjected to an adverse employment action by Defendant when she was bypassed for the SRO position at Gateway Middle School. However, "[t]he jury's findings should be excluded from the decision-making calculus on a Rule 50(b) motion, other than to ask whether there was sufficient evidence, as a legal matter, from which a reasonable jury could find for the party who prevailed at trial." Chaney v. City of Orlando, Fla., F.3d, 2007 WL 1063010 *6 (11th Cir. 2007).

[4]The Court notes that Plaintiff demonstrated direct evidence of gender discrimination in the testimony elicited from Chief Hollomon.

[5]The Court recognizes that reliance on unreported Eleventh Circuit decisions is disfavored. However, Burlington is a newly-decided case and, according to Westlaw, none of the Eleventh Circuit opinions that cite Burlington (at least on this point) have been selected for publication in the Federal Reporter. Moreover, Wallace merely clarifies what the Supreme

Court determined in Burlington.

[6]After the jury's verdict, Plaintiff acknowledged that her Rule 50 motion was moot.

Filed 7/25/08
No. 07-12599
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELAINE WEBB-EDWARDS,
Plaintiff-Appellant-Cross-Appellee,

Versus

ORANGE COUNTY SHERIFF'S OFFICE,
Defendant,

KEVIN BEARY, in his official capacity as Orange County Sheriff,
Defendant-Appellee-Cross-Appellant.

ORDER

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.

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No. 08-547

Supreme Court, U.S.
FILED
NOV 24 2008
OFFICE OF THE CLERK

In The Supreme Court of the United States

ELAINE WEBB-EDWARDS,

Petitioner,

v.

KEVIN BEARY, IN HIS OFFICIAL CAPACITY AS SHERIFF OF ORANGE COUNTY, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner has presented a compelling reason for certiorari in this case given that the Eleventh Circuit's decision does not conflict with either this Court's precedent or the decisions of other circuit courts.

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STATEMENT OF THE CASE

In this case, Petitioner Elaine Webb-Edwards ("Webb-Edwards") sued Kevin Beary in his official capacity as the Sheriff of Orange County, Florida ("Beary"). Webb-Edwards asserts that Beary violated Title VII of the Civil Rights Act of 1964 by failing to appoint her to the position of School Resource Officer ("SRO") at Gateway Middle School because of her gender.

After the jury rendered a verdict in her favor, the district court granted Beary's motion for judgment as a matter of law pursuant to Rule 50(a), and the Eleventh Circuit affirmed. App. 45-65; App. 1-41. In ruling in Beary's favor, both the district court and the Eleventh Circuit held that Webb-Edwards had not presented sufficient evidence from which a reasonable jury could find that she had suffered an adverse employment action emanating from the failure to appoint her to an SRO position at Gateway Middle School. App. 35-40, 52-53.

As of the date of her application for an SRO position on August 4, 2004, Webb-Edwards had been working as a property detective for the Sheriff's office. App. 52. Notably, in applying for appointment as an SRO, Webb-Edwards openly admits that she was not applying for a particular position at a specific school. App. 37, 52; Record 84, pp. 69:11-70:8,

92:24-93:10, 116:7-15.[1] Rather, per the department's policy, an officer who successfully completed the SRO review process could be appointed to an available position at any school. Record 84, pp. 69:16-70:8, 116:7-15.

Following an interview by a three-member panel, Webb-Edwards was placed second on the list of officers eligible for appointment to an SRO position, a list which was valid for four months. Record 84, pp. 41:15-19, 42:12-16, 43:16-44:7, 78:10-80:23, 125-9-126:18. After the first officer on the list was appointed to an opening at Piedmont Lakes Middle School, a subsequent opening became available at Gateway Middle School. App. 11. Webb-Edwards was not selected for the Gateway Middle School SRO position, due to the decision-maker's desire for a larger, more physically-imposing officer to staff the position at that school. App. 16-19; Record 84, pp. 42:24-43:1, 74:9-16, 107:25-108:12, 112:22-113:10, 118:12-119:10, 120:22-121:23, 133:10-17, 139:24-140:11, 141:20-142:15, 143:5-9, 152:21-153:17, 166:1-15.

As the Eleventh Circuit emphasized, Webb-Edwards' interest in becoming an SRO centered around her desire to teach, advise and counsel students, as well as her desire to participate in academic and extracurricular activities. App. 22, 39.

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[1] Citations to the Record are to the appropriate docket entry followed by the appropriate page and line designations. Docket entry 84 corresponds to day one of the trial transcript, while docket entry 85 corresponds to day two of the trial transcript.

Significantly, the facts in this case are undisputed that the atmosphere at Gateway Middle School precluded any teaching activities as the SRO's time is spent "going from classroom to classroom or breaking up a fight in the hallway or assisting in the office with a student that [has] acted out[.]" App. 14, 37. The SRO at Gateway Middle School is also substantially more likely to be subject to violent or threatening behavior. App. 17-18, 37-38. Gateway's unique challenges in this respect are a result of the fact that the school is the district's "final step for students with severe behavioral problems" who are not "able to function safely in a regular environment." App. 17. The students at the middle school range in age from 12 to 22. App. 16-17. The majority have criminal histories as well as psychological or behavioral problems. App. 15, 17. The majority are also on medication and have been diagnosed with clinical depression. App. 15.

On November 9, 2004 at 2:23 p.m., approximately fifteen days after being formally advised that she had not been appointed to the Gateway position, Webb-Edwards sent an e-mail to Human Resources Director Daniel Ford advising of her intention to resign from the department, effective December 31, 2004. App. 39; Record 84, pp. 47:6-8, 50:6-22, 81:6-17, 77:19-21, 79:1-21.

Within three hours after Webb-Edwards' e-mail, another SRO position vacancy, this one at Conway Middle School, was confirmed and orally offered to

Webb-Edwards. Record 84, pp. 130:13-131:3, 163:11-18, 164:7-10; Record 85, pp. 72:5-74:9.

In contrast to Gateway, the environment at Conway Middle School would have enabled Webb-Edwards to participate in those activities that she sought when applying for an SRO position. App. 39. At Conway, the SRO had "an opportunity to make a difference through counseling, mentoring, teaching, coaching, [and] doing all the after-school activities." App. 18-19, 38. "It's a very positive place to be as opposed to Gateway[,] which is controlled chaos." App. 19.

Notwithstanding, Webb-Edwards testified that the Conway offer was "too little too late." App. 20. She further advised that Director Ford would have to speak to her attorney on the matter. App. 15. Consequently, she rejected the Conway Middle School SRO position and elected to resign. Record 84, pp. 55:6-14, 82:12-18, 100:21-101:13; Record 85, pp. 75:24-76:14, 77:15-21.

The facts are undisputed that both SRO positions offered the same exact pay and benefits, which was also identical to the pay and benefits Webb-Edwards earned as a property detective. Record 84, pp. 91:13-92:20, 119:11-120:1, 164:11-14. Moreover, serving as a property detective involved an occasional encounter with a perpetrator resisting arrest. App. 39. In contrast, the Gateway SRO position involved the daily threat of being physically assaulted. App. 39.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 states that a petition for writ of certiorari "will be granted only for compelling reasons." In the present case, Webb-Edwards' petition presents no compelling reason for this Court to grant a writ of certiorari. Rather, notwithstanding her strained efforts to assign a new legal standard to the Eleventh Circuit, in reality Webb-Edwards merely contends, erroneously, that the circuit court misapplied a properly stated rule of law. In accordance with the considerations enunciated in Rule 10, Beary contends that the petition should be denied.

I. The Eleventh Circuit's adverse personnel action analysis is consistent with this Court's precedent.

After a thorough and painstaking analysis of the applicable legal standards and the record evidence viewed in the light most favorable to Webb-Edwards, the Eleventh Circuit correctly concluded that the failure of Webb-Edwards to be appointed to the SRO position at Gateway Middle School did not constitute an actionable adverse personnel action under the circumstances of this case.

Webb-Edwards' petition is premised upon the mistaken view that, in so holding, the Eleventh Circuit formulated a new standard incompatible with this Court's precedent and at odds with the decisions of other circuits. Contrary to Webb-Edwards' argument, nowhere in its decision does the Eleventh

Circuit purport to enunciate a new legal test. Rather, the court expressly applies the undisputed facts of this case to the standards previously articulated by this Court and its own.

In reaching their decisions, there can be little doubt that both the district court and the circuit court commenced its review with the appropriate legal standard, articulating the familiar *prima facie* framework employed in Title VII cases. To prevail on her claim, Webb-Edwards was required to prove (1) that she was a member of a protected class, (2) that she was qualified for the job, (3) that she suffered an adverse employment action, and (4) that she was displaced by someone outside the protected class. App. 35.

The decisions of the district and circuit courts in this case focused on the existence, or lack thereof, of the adverse employment action element. In the petition, Webb-Edwards repeatedly confuses this element with the existence of discriminatory animus, which was presumed by the lower courts.

Quoting this Court's decision in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L. Ed. 2d 633 (1998), the Eleventh Circuit began its analysis by noting, "[a] tangible employment action constitutes significant change in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits." Elaborating on this standard as

applied to discrimination claims, the circuit court quoted from its 2001 holding in *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1239, stating:

> [T]o prove adverse employment action in a case under Title VII's anti-discrimination clause, an employee must show a serious and material change in the terms, conditions, or privileges of employment. Moreover, the employee's subjective view of the significant adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances.

Applying this standard, the court held that a reasonable jury could not have concluded that Webb-Edwards' failure to receive a lateral transfer to the Gateway SRO position constituted adverse employment action under the facts of this case. In reaching this result, the circuit court began with the fact that a transfer to the Gateway position from her position of property detective would not have resulted in any changes in Webb-Edwards' pay or benefits. The court further noted that applicants for SRO positions, including Webb-Edwards, did not apply for a position at a particular school, nor were they guaranteed a position in a particular school. Rather, even where, as here, the applicant successfully completed the review process, he or she nevertheless could be appointed to any open SRO position. Given the uncontroverted record evidence establishing that Webb-Edwards was offered an SRO position at Conway Middle School immediately after the human resources director was

advised that she had been bypassed for the Gateway position, the determination that Webb-Edwards had not been subject to adverse personnel action was clearly proper.

Perhaps most importantly, the circuit court also emphasized the undisputed fact establishing that Webb-Edwards' motivation in applying for an SRO position was her stated desire to teach, counsel and coach children and to participate in a school's academic and extracurricular activities. Given that it was equally undisputed that the position at Gateway precluded participation in these activities due to the unique nature of its student population, no reasonable jury could conclude that Webb-Edwards had suffered adverse employment action by failing to obtain the Gateway position.

Finally, the circuit court also contrasted the fact the Gateway SRO position exposed the officer holding that position to the daily threat of assault, while the property detective position was exposed to an occasional perpetrator resisting arrest. In making this contrast, the court was not articulating a new standard in which the adverse employment action analysis was dependent upon a threat of harm. Rather, the court was further buttressing its conclusion that, if anything, appointment to the Gateway SRO position would have been viewed by a reasonable jury as more adverse than being denied the position.

Nonetheless, throughout her petition and in an attempt to conjure a conflict of precedent where none

exists, Webb-Edwards conflates the Eleventh Circuit's adverse action analysis with cases focusing on the existence of discriminatory animus in the first instance. As Webb-Edwards notes, however, the Eleventh Circuit in this case assumed that sufficient evidence of discriminatory animus existed. Even where a discriminatory motive is established, however, a litigant is still required to prove that he or she suffered adverse employment action. 42 U.S.C. §2000e-2(a)(1); *see, e.g.*, *Grimsley v. Marshalls of MA, Inc.*, 284 Fed. Appx. 604, 608, 2008 WL 2435581 (11th Cir. June 17, 2008) (unpublished) ("In order to establish a disparate treatment race claim, a plaintiff must also show that an adverse employment action was taken against him regardless of whether he is relying on direct evidence of discrimination or employing the burden-shifting approach for cases in which only circumstantial evidence is available"); *Ballard v. Portland General Elec. Co.*, 2008 WL 3822317, at *1 (9th Cir. Aug. 11, 2008) (unpublished) ("[W]hether under a direct evidence approach or under the *McDonnell Douglas* approach, Ballard's claim fails because he did not suffer any adverse employment action").

In this respect, Webb-Edwards' reliance upon this Court's decisions in *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L. Ed. 2d 786 (1977) and *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S.Ct. 1196, 113 L. Ed. 2d 158 (1991), is misplaced. Neither *Dothard* nor *Johnson Controls* involved an assessment of whether adverse employment action

had been established. Indeed, both *Dothard* and *Johnson Controls* involved failure to hire allegations, decisions which indisputably constitute adverse employment action for purposes of Title VII's anti-discrimination mandate.

As the circuit court's reference to safety in this case was merely one of several facts for consideration as to whether the failure to obtain the Gateway SRO position was adverse and was not a new legal standard articulated by the court, Webb-Edwards' petition should be denied.

II. The Eleventh Circuit's adverse personnel action analysis is consistent with the analysis used by other circuits.

In a further effort to create a conflict where none exists, Webb-Edwards next contends that the Eleventh Circuit's decision conflicts with decisions emanating from the Ninth, Tenth and the District of Columbia Circuits. Specifically, Webb-Edwards relies upon the decisions in *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997), *Hillig v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004) and *Smith v. Sect'y of the Navy*, 659 F.2d 1113 (D.C. Cir. 1981). A careful review of these decisions reveals that they are inapposite to the issues in the present case, however.

Both *Hashimoto* and *Hillig* involved an adverse employment action analysis stemming from retaliatory employment references provided to prospective

employers. In those cases, the courts took the position that, to establish actionable adverse action, a plaintiff need only establish that the discriminatory act caused "harm to future employment prospects" and that the plaintiff need not prove a particular job opportunity was lost. *Hillig*, 381 F.3d at 1032-33. Similarly, in *Smith* the court held that a plaintiff who was subjected to a discriminatory performance evaluation need not necessarily prove that the evaluation caused him to lose a specific job or promotion. While these points of law may be in conflict with other circuits, they are irrelevant to the present case.

In the present case, the Eleventh Circuit followed its previously-articulated test for adverse employment action, that the employee must prove a serious and material change in his or her terms, conditions or privileges of employment. The Eleventh Circuit did not comment upon the appropriate test for analyzing adverse action as it relates to future job prospects.

A review of case law from the Ninth, Tenth and District of Columbia Circuits arising under similar facts as are present in this case compels the conclusion that the Eleventh Circuit's articulated standard is consistent with the treatment of this issue by its sister circuits. *See, e.g., Ginger v. District of Columbia*, 527 F.3d 1340, 1343-44 (D.C. Cir. 2008), *reh'g en banc denied* (July 31, 2008), *pet. for cert. filed* (Oct. 29, 2008); *Sanchez v. Denver Public Schools*, 164 F.3d

527, 532 (10th Cir. 1998); *Davis v. Team Elec. Co.*, 520 F.3d 1080 (9th Cir. 2008).

In *Ginger*, the court analyzed the existence of adverse employment action in the context of a department reorganization causing changes in assignments and shifts. In making this assessment, the court articulated the appropriate inquiry in terms nearly identical to the standard applied by the Eleventh Circuit in this case, "employment action does not support a claim of discrimination unless it has 'materially adverse consequences affecting the terms, conditions or privileges of the plaintiff's employment such that a reasonable trier of fact could find objectively tangible harm.'" *Id.* at 1343 (quoting *Forkkio v. Powell*, 306 F.3d 1127, 1131 (D.C. Cir. 2002)).

Similarly, the court in *Sanchez*, citing to this Court's language in *Ellerth* mandating a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits[,]" held that a teacher's transfer to a neighboring school did not constitute adverse employment action. *Sanchez*, 164 F.3d at 532.

In *Davis*, the Ninth Circuit, while noting that the assignment of more burdensome job responsibilities does constitute an adverse employment action, emphasized that "an adverse employment action is one that *materially affects* the compensation, terms,

conditions or privileges of employment." *Id.* at 1089 (emphasis supplied). Even in *Hillig*, relied upon by Webb-Edwards, the court noted that it requires the employer's conduct to be "materially adverse to the employee's job status[.]" *Id.* at 1033.

As is readily apparent from these cases, the standard articulated and applied by the district and circuit courts in this case is not a departure from the standards applied by other circuits in similar cases. Accordingly, Webb-Edwards' petition should be denied.

III. Neither the district court's nor the Eleventh Circuit's decisions invaded the province of the jury.

Finally, Webb-Edwards' also contends that certiorari is appropriate because the Eleventh Circuit's decision allegedly usurps the province of the jury contrary to this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L. Ed. 2d 105 (2000). Webb-Edwards' argument in this respect is without merit. As comprehensively discussed in the Eleventh Circuit's decision, the court did not merely second guess the jury's conclusions. To the contrary, it carefully reviewed the record evidence in the light most favorable to Webb-Edwards and determined that there was insufficient evidence establishing a necessary

element of her claim, *i.e.*, that she had suffered adverse employment action.

Here again, Webb-Edwards' argument is premised upon the erroneous assumption that she need not establish the element of adverse employment action since the courts presumed that she could establish the element of discriminatory animus. All of the evidence that Webb-Edwards cites as evidence of the lower courts' alleged error focuses on the element of discriminatory animus, not on the element of adverse employment action which was the issue on appeal.

With the issue properly framed, it is clear that the courts properly applied the record evidence of this case to the correct legal standard and concluded that no reasonable jury could find that Webb-Edwards' failure to receive an SRO appointment to Gateway constituted adverse employment action. Accordingly, both the district court and the Eleventh Circuit properly decided this case and, as such, the petition should be denied.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

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